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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLENWOOD WILLIAMS,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

I. Whether §33(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §933(b) (1976), bars injured employees' third-party actions against additional third party tortfeasors, brought later than six months after receipt of compensation under an award, where the injured employee initially filed suit against one third-party tortfeasor within the six-month period?

II. Whether §33(b) of the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. §933(b) (1976), bars injured employees' third-party actions, brought later than six months after receipt of compensation under an award, where there exists specific evidence that a complex insurance scheme undermines the statutory purpose of §33(a) and terminates the employees' post-assignment rights under §§33(d) and 33(e)(2) of the LHWCA?

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IN THE

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OCTOBER TERM, 1983

No.

GLENWOOD WILLIAMS,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner respectfully requests that this Court grant a Writ of Certiorari to review the Opinion and Judgment of the United States Court of Appeals for the District of Columbia Circuit (No. 83-1003) dismissing Petitioner's appeal from an Order of Summary Judgment issued against him.

OPINIONS BELOW

The United States District Court for the District of Columbia Memorandum and Judgment, dated October 6,

1982, is unreported, but appears as Petitioner's Appendix A, p. 1a. *Williams v. Washington Metropolitan Area Transit Authority,* No. 82-0999 (D.D.C. Oct. 16, 1982). The opinion of the United States Court of Appeals for the District of Columbia Circuit, dated August 19, 1983, from which certiorari is sought, appears as Petitioner's Appendix B, p. 3a.

JURISDICTION

The United States Court of Appeals for the District of Columbia Circuit decided this case on August 19, 1983 (App. B). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) (1976).

RELEVANT STATUTES

The relevant statutory provisions are as follows:

District of Columbia Code (1973 Ed.):
§36-501. Longshoremen's and Harbor Workers' Compensation Act As Made Applicable to the District of Columbia.

> The provisions of the Longshoremen's and Harbor Workers' Compensation Act, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee or an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia and the term "employee" shall be held to mean every employee of such person.

United States Code, Title 28:
§1254. Court of Appeals; Certiorari; Appeal; Certified Questions.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

United States Code, Title 33:
§904(a). Liability for Compensation.

Every employer shall be liable for and shall secure payment to his employees of the compensation payable under Section 907, 908 and 909. In the case of the employer who is a subcontractor, the contractor shall be liable for and shall secure the payments of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

§905(a). Exclusiveness of Remedy and Third-Party Liability.

The liability of an employer prescribed in Section 904 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next-of-kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under the Act or to maintain an action at law or in admiralty for damages on account of such injury or death.

In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, or that the employee assumed the risk of his employment, or that the injury was due to the contributory negligence of the employee.

§932(a)(1)(A). Security for Compensation

(a) Every employer shall secure the payment of compensation under this Act –

(A) By insuring and keeping insured the payment of each compensation with any stock company or mutual company or association, or with any other person or fund, while such person or fund is authorized under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the Secretary, to insure payment of compensation under this Act.

§933(a). If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer or a person or persons in his employ is liable in damages, he need not elect whether to receive such compensation or to recover damages against such third person.

§933(b). Compensation for Injuries Where Third Persons Are Liable.

Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all rights of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

§933(d). Compensation for Injuries Where Third Persons Are Liable.

> Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

§933(e)(1)(A)-(D). Compensation for Injuries Where Third Persons Are Liable.

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> (1) The employer shall retain an amount equal to –
>
> (A) the expenses incurred by him in respect to such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner or Board);
>
> (B) the cost of all benefits actually furnished by him to the employee under section 7;
>
> (C) all amounts paid as compensation;
>
> (D) the present value of all amounts thereafter payable as compensation, such present value to be computed in accordance with a schedule prepared by the Secretary, and the present value of the cost of all benefits thereafter to be furnished under section 7, to be estimated by the deputy commissioner, and the amounts so computed and estimated to be retained by the employer as a trust fund to pay such compensation and the cost of such benefits as they become due, and to pay any sum finally remaining in excess thereof to the person entitled to compensation or to the representative.

§933(e)(2). Compensation for Injuries Where Third Persons Are Liable.

> Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:
>
> . . . .
>
> The employer shall pay excess to the person entitled to compensation or to the representative, less one-fifth of such excess which shall belong to the employer.

§33(h). Where the employer is insured and the insurance carrier has assumed the payment of the compensation, the insurance carrier shall be subrogated to all the rights of the employer under this section.

§938(a). Penalty For Failure To Secure Payments of Compensation.

> Any employer required to secure the payment of compensation under the Act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment; and in any case where such employer is a corporation, the president, secretary and treasurer thereof shall be also severally liable to such fine or imprisonment as herein provided for the failure of such corporation to secure the payment of compensation; and such president, secretary and treasurer shall be severally personally liable, jointly with such corporation, for any compensation or other benefit which may accrue under the said Act in respect to any injuiry which may occur to any employee of such corporation while it shall so fail to secure the payment of compensation as required by Section 932 of this Act.

STATEMENT OF THE CASE

Petitioner, Glenwood Williams was a laborer and a hard rock miner for the joint venture of Ball-Healy-Granite, a contractor engaged by the Washington Metropolitan Area Transit Authority ("WMATA") for the construction of the Metro subway system. At all pertinent times, Bechtel Associates Professional Corporation, D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel") were the safety engineering consultants to WMATA at its construction sites.

In February 1980, Petitioner received a medical report from a physician stating for the first time that his exposure to underground dust and fumes had caused his lung condition. (Appendix C) On August 28, 1981, Petitioner Williams received a formal award of compensation. (Appendix D) Even prior to this award, on April 9, 1981, Petitioner brought a third-party negligence action against Bechtel in the Superior Court for the District of Columbia alleging that Bechtel had failed to provide a safe and healthy working environment. (Appendix E) This action was actually instituted before the six-month statutory assignment period had begun to run. 33 U.S.C. §933(b) (1976). Almost six months after the compensation settlement agreement was reached, Bechtel moved for summary judgment claiming that they were agents of WMATA and, as such, they were immunized from suit by the WMATA Compact. Art. I. §10 cl.3 of the United States Constitution.

On April 9, 1982, the Petitioner moved to amend his complaint in Superior Court asserting a cause of action against WMATA as a third-party defendant. (Appendix F) Because of the uncertainty in the law at that time as to which court was the proper forum for actions instituted against WMATA, the Petitioner also filed an original

third party action against WMATA in the United States District Court for the District of Columbia. (Appendix G) The Superior Court denied the motion to amend based on an erroneous assumption that the Court lacked subject matter jurisdiction over WMATA, and granted Bechtel's Motion for Summary Judgment, concluding that Bechtel was an agent of WMATA and that WMATA was exclusively liable for the torts of its agent, Bechtel. Petitioner Williams appealed the denial of the Motion for Leave to File An Amended Complaint and filed a Motion for Summary Reversal (Appendix H) based upon the District of Columbia Court of Appeals decision in *Qasim v. Washington Metropolitan Area Transit Authority,* 455 A.2d 904 (1983), wherein the court stated that the Superior Court for the District of Columbia has subject matter jurisdiction over WMATA. This motion is presently pending before the District of Columbia Court of Appeals. The Petitioner continued to pursue his third-party cause of action against WMATA in the United States District Court for the District of Columbia.

Subsequently, the district court dismissed the Petitioner's suit against WMATA on October 6, 1982, because the action was not filed within the six-month statutory period as provided in 33 U.S.C. §933(b). In a consolidated appeal, the United States Court of Appeals for the District of Columbia Circuit affirmed the judgment of the district court, holding that the "conflict of interest" exception under §33(b) did not survive the amendments to the Longshoremen's and Harbor Workers' Compensation Act and the decision in *Rodriguez v. Compass Shipping Co.*, 451 U.S. 595 (1981).

Thus, the Court of Appeals ruled that pursuant to this Court's analysis of §33(b) in *Rodriguez,* Petitioner's arguments concerning the conflict of interest inherent in

the WMATA Coordinated Insurance Program were irrelevant and, therefore, the actions were barred by the six-month statutory assignment provision of §33(b). The Court of Appeals never addressed the issue of whether this Court's holding in *Rodriguez* precludes the partial assignment of injured employees' third party claims to the employer and whether the *Rodriguez* decision mandates that the filing of an initial third party action within the six-month period entirely divests the employer of his right to sue other third party tortfeasors in the post-assignment period.

Petitioner submits that the insurance arrangement herein in fact deviates from the statutorily mandated scheme, necessarily terminates the post-assignment rights given him by Congress in §§33(d) and (e)(2) of the Act and that, for these reasons, the carrier should not benefit from a §33(b) assignment. Under WMATA's Coordinated Insurance Program, WMATA, rather than its subcontractors, purchased the workers' compensation insurance for the employees of its subcontractors. WMATA's Coordinated Insurance Program, (hereinafter referred to as CIP) also referred to as wrap-up insurance, involves WMATA's selection of a single insurance carrier, Lumberman's Mutual Casualty Company, to insure all workers' compensation and third party liability claims arising out of WMATA's subway construction, and WMATA's payment for this insurance coverage for all its subcontractors. With regard to this arrangement, the United States Court of Appeals for the District of Columbia has recently held in the case of *Johnson v. Bechtel Associates Professional Corp., D.C., et al.* (Decided August 19, 1983, App. B) that WMATA's wrap-up plan circumvents the statutory scheme intended by Congress and preempts the subcontractor's statutory duty to secure its own workers' compen-

sation insurance coverage. (Decision at 18-19). Petitioner asserts herein that this wrap-up insurance plan is also designed to limit his third-party rights under section 33(a) of the Act and to terminate his post-assignment rights under §§33(d) and (e)(2). For these reasons, the action herein should not be barred by the statutory assignment provisions of §33(b).

Moreover, by instituting suit against the original third-party defendant four months before he received an award of compensation, the Petitioner exercised his right to sue under §33(b) of the Act and thereby precluded the assignment of any rights of action he may have had against additional third party tortfeasors. Therefore, the Petitioner's third-party action against Respondent is not barred by the statutory assignment provisions of §33(b).

The Court should be made aware that petitions are presently pending before it concerning precisely the same issues herein, in the cases of *Thomas Westbrook v. Hutchinson Crane Excavating Co., Inc.*, (October 1983 term); and *Lyle Edwards, et al. and Darwin H. Smith v. Bechtel Associates Professional Corp., D.C., et al.* (October 1983 term).

ARGUMENT

I. THE FILING OF PETITIONER'S THIRD PARTY ACTION AGAINST ONE THIRD PARTY WITHIN THE SIX MONTH PERIOD IS SUFFICIENT TO PRECLUDE THE ASSIGNMENT OF PETITIONER'S CLAIM AS TO OTHER THIRD PARTY TORTFEASORS. THEREFORE, §33(b) SHOULD NOT OPERATE AS A BAR TO PETITIONER'S ACTION HEREIN

In construing any of the provisions of the Longshoremen's and Harbor Workers' Compensation Act, it is essential to recognize that the Act was designed as a remedial instrument intended to promote the interests of the employer and injured employees. *O'Keefe v. Smith, Hinchman and Grylls Associates,* 380 U.S. 359 (1965); *Swinton v. J. Frank Kelly, Inc.,* 554 F.Supp. 938 (D.D.C. 1960); *Best v. James,* C.A. No. 10645-79, Vol.109, No.223, Washington Law Reporter 2369 (October 27, 1981). The provisions of the Act and, particularly, of §33(b) must be construed in a manner which best effectuates this remedial purpose.

In *Johnson v. Bechtel Associates Professional Corp., D.C., et al.* (Slip Opinion decided August 19, 1983), the Court of Appeals concluded that the filing of the Petitioner's third party action against one third party tortfeasor before the expiration of the statutory assignment period did not prevent the assignment of Petitioner's right of action as to additional third party tortfeasors. In so holding the *Johnson* court split the Petitioner's right of action; this is a result which is clearly at odds with the Supreme Court's ruling in *Rodriguez* which unequivocally states that the right of action against third party tortfeasors shall not be split between the employer and the employee. Once a claim has been asserted against a negligent third party within the six-month period by the injured

employee, "exclusive control of the action" is vested in the employee:

> The statutory assignment encompasses 'all right' of the employee to recover damages from a third party. These words preclude the possibility that the assignment is only a partial one that does not entirely divest the employee of his right to sue, or that the employee and the employer possess concurrent rights to sue in the post-assignment period. When §33(b) assignment occurs, it transfers an employee's entire right to commence a third party action to an employer.

Rodriguez, supra, at 603. Thus, this Court expressly rejected the notion of a partial assignment of actions or of concurrent rights to sue, asserting that the right of action against negligent third parties is transferred entirely when assignment occurs. By the same token, Petitioner asserts that when assignment does not occur, as when an injured employee institutes an action within the statutory assignment period against one third party tortfeasor, the entire right of action as to all negligent parties involved remains in the absolute control of the injured employee. "Section 33(b) allocates *absolute* control of potential tort claims against third parties." *Dunbar v. Retla S.S. Co.,* 484 F.Supp. 1308, 1310 n. 1 (E.D.Pa. 1980) (Emphasis added). The intent of §33(b) is to assign the entire cause of action or to permit the cause of action to remain exclusively within the absolute control of the injured employee. Thus, the right of action is not to be split between the employer and the injured employee.

By filing an action against the original third party tortfeasor four months before the entry of an award of compensation, Petitioner Williams asserted his right of action under the Act and, therefore, maintained absolute control

over the entire right of action as to the initial third party tortfeasor as well as to any other third parties which might subsequently be added to the initial action or which might subsequently be sued on the same cause of action in another forum. Therefore, Petitioner Williams' claim against Respondent WMATA has not been assigned to his employer.

Moreover, the statutory provisions of §33(b) were designed to balance the competing interests of employers and injured employees. In balancing these interests, some protection was afforded the employer by §33(b) in requiring that the employer be given notice within six months of an award of compensation of the injured employee's intention to pursue a third party cause of action and in requiring that such notice be given by the filing of a third party action within that six-month period. *Griffin v. The Crane Rental Company, Ltd.*, C.A. No. 5568-78, Vol.109, No.245, Washington Law Reporter 2617, 2621 (December 22, 1981). Ultimately, the employer and the injured employee are the "primary beneficiaries of the Act." *Best, supra,* at 2374. At no time have any provisions been made under §33(b) of the Act to protect the interest of negligent third parties; nor have any protections been implied in the statutory language of the assignment provision. Rather, the assignment provision of §33(b) is only intended to provide notice to the employer of the injured employee's intention to exercise his right to pursue a third party cause of action. The only protection afforded negligent third parties such as WMATA is that which is afforded by the applicable statute of limitations period. *Best, supra,* at 2374. Hence, the Act does not require that negligent third parties receive notice of pending claims earlier than three years from the date of the accident. To hold, as the *Johnson* court did, that Petitioner's claim against WMATA was

assigned to his employer in effect vests rights in Respondent WMATA which it clearly does not have. Again, the assignment provisions are intended to notify the employer, not the third party tortfeasor, of an injured employee's intention to pursue an alternative remedy at law. Such notice is effectively given to the employer upon the filing of the original action against one negligent third party; it is not a requirement of the Act that all potential third party tortfeasors be named in the original action for purposes of precluding the assignment of the injured employee's right of action under §33(b).

II. WMATA'S CIP ATTEMPTS TO LIMIT PETITIONER'S THIRD PARTY RIGHTS UNDER §33(a) OF THE LHWCA AND TO EXTINGUISH THE PETITIONER'S POST-ASSIGNMENT RIGHTS UNDER §33(d) AND §33(e)(2). FOR THESE REASONS §33(b) SHOULD NOT OPERATE AS A BAR TO THE ACTIONS HEREIN.

Assuming for the sake of argument that there has been an assignment of Petitioner Williams' third-party action against Respondent WMATA, Petitioner submits that the conflict of interest exception to the statutory assignment provisions, as defined in *Czaplicki v. The Heogh Silvercloud,* 351 U.S. 525 (1976), precludes the assignment of Petitioner's third-party claim against WMATA.

The United States Court of Appeals for the District of Columbia Circuit, in a detailed opinion, dismissed the Petitioner's claim stating that the conflict of interest exception did not survive the "post-*Czaplicki* amendment of the Act and *Rodriguez.*" *Johnson, supra,* at 27. The *Rodriguez* Court did state that a conflict of interest could not be presumed simply because an employer does not sue on an assigned claim. *Id.,* at 618. Nonetheless, to suggest that this Court repudiated the conflict of interest excep-

tion altogether ignores the plain language of the *Rodriguez* decision which expressly avoided any discussion of whether the Court, when presented with evidence of a serious conflict of interest, would prohibit the enforcement of §33(b) to bar a third party claim. With regard to the continuing viability of the conflict of interest exception the *Rodriguez* Court stated, in pertinent part, the following:

> We leave for another day the question whether an assignment under §33(b) will bar a longshoreman's third-party action if there is specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended §933.

Id., at 618. It is apparent from this language that this Court envisioned factual situations where a conflict of interest would preclude the assignment of injured employees' third party claims. Subsequent decisions in the federal courts have similarly affirmed the vitality of the *Czaplicki* conflict of interest exception. This Court's ruling in *Rodriguez* with respect to the conflict of interest exception was recognized by the United States District Court for the Eastern District of Virginia in *Bandy v. Bank Line, Ltd.*, 518 F.Supp. 1229 (E.D.Va. 1981) wherein the court stated that "the [*Rodriguez*] Court essentially found that the Longshoreman's right to file suit was completely cut off *unless he could prove a conflict of interest* as delineated by *Czaplicki*." *Id.*, at 1231 (Emphasis added).

In *Susino v. Hellenic Lines, Ltd.*, 551 F.Supp. 1080 (E.D.N.Y. 1982), the court found that the *Czaplicki* exception had not "even [been] seriously criticized" and again concluded that *Czaplicki* continued to provide a viable exception to the assignment provisions of §33(b):

> Where, as here, an actual and demonstrable conflict of interest exists between the employer and

> the third party so that the former could never be expected to sue the latter, the injured longshoreman does not lose his right to sue upon the expiration of the six month statutory period.

Susino, supra, at 1083. It is obvious from the foregoing that, where an overt conflict of interest exists, the assignment provisions of §33(b) will not bar an injured employee's third party claim.

The refusal of the *Rodriguez* Court to address the question of when such a conflict of interest would be present left for future court decisions the responsibility for determining what factual predicate must be presented to the court to bar the enforcement of the assignment provisions of §33(b). The day has come when this question must be addressed. Petitioner submits that the instant action presents precisely the question left unanswered by the *Rodriguez* Court: the voluntary insurance scheme engineered by WMATA creates such a serious conflict of interest among the parties as to bar the application of the §33(b) assignment provision.

In the process of resolving the several issues presented in a consolidated appeal, the United States Court of Appeals for the District of Columbia Circuit held, in the case of *Johnson v. Bechtel Associates Professional Corp., D.C., et al.* (Slip Opinion Decided August 19, 1983), that the CIP initiated by WMATA deviated from the statutory scheme mandated by the Act. The upshot of WMATA's insurance scheme was to circumvent the statutory purpose of the Act to the detriment of the injured worker the Act was designed to protect. The Court in *Johnson* expressly stated, "[the fact] that it was more convenient and cost effective to WMATA to carry the insurance does not excuse deviation from the statutory scheme" *Id.*, at 19. The *Johnson* Court concluded that WMATA's failure to fol-

low the language of the Act by unilaterally initiating its wrap-up insurance plan and preempting the subcontractor's primary statutory duty to secure compensation coverage resulted in confusion as to which entity was a third party under §33(a) and which was an employer entitled to immunity under §5(a) (Decision at 20.) The Court held that WMATA remained subject to suit as a third party, and was not immune by virtue of its creation of the CIP as an "employer," as claimed by WMATA.

It is undisputed that Congress' overriding concern in promulgating the Act was to preserve and protect the rights of the injured workers. Petitioner submits that WMATA's CIP obscures the rights and remedies of the injured worker and is in fact designed to lessen rather than safeguard the rights of the injured workers. Petitioner submits that WMATA's insurance scheme goes beyond the conflict of interest situation presented in *Czaplicki v. The Hoegh Silvercloud,* 351 U.S. 525 (1956). The insurance scheme herein subverts from the Congressional intent of §33(a), which allows injured workers to sue third parties for damages, by permitting WMATA, a potential third party defendant, to claim immunity by its "quid pro quo" purchase of compensation for its contractors. Further, the CIP deviates from the statutory requirements of §4(a) by preventing WMATA's subcontractors from fulfilling their statutory obligation to secure their own compensation. For these reasons, §33(b) should not be allowed to bar Petitioner's cause of action, for only the carrier which is subrogated to the employer's interest under §33(h), and ultimately WMATA itself, will benefit from the assignments.

In addition to interfering with Petitioner's rights under §33(a), WMATA's CIP has violated additional statutory provisions in the LHWCA. Because wrap-up insurance

was designed to create one deep pocket for all subway construction and thereby save money, the insurance scheme thwarts the post-assignment rights of injured workers under §33(d) and §33(e).

Section 33(d) of the LHWCA states that "[s]uch employer on account of such assignment *may either* institute proceedings for the recovery of such damages *or* may compromise with such third person either without or after instituting such proceeding." 33 U.S.C. §933(d) (Emphasis added). Petitioner notes that a plain reading of §33(d) mandates that, upon assignment of the employee's claim, an employer of the substituted carrier under §33(h) must take some action to pursue the employee's third-party claim. Although §33(d) does mandate some action by the employer, the language of this subsection is flexible in providing the employer with two means of pursuing the third-party claim: compromising with the third party or initiating a suit against the third party. In the present case, the CIP necessarily results in the abandonment of all third-party rights, since one deep pocket has been deliberately created by the plan. Thus, the intent of §33(d) is frustrated since Lumberman's Mutual has no interest in and no intention of performing either of its statutory duties under §33(d).

A second subsection, §33(e)(2), 33 U.S.C. §933(e)(2), further encourages the pursuit of the assigned claim by endowing the employer with a monetary interest in the employee's claim. Prior to the 1959 amendments, §33(e)(2) merely required the employer to "pay any excess [recovery] to the person entitled to compensation or to the representative." 33 U.S.C. §933(e)(2) (1927), amended by Pub. L. 86-171, 73 Stat. 391 (1959). Upon the enactment of the 1959 amendments, §33(e)(2) was amended to read as

follows: "The employer shall pay any excess . . . to the person entitled to compensation . . . , less one-fifth of such excess which shall belong to the employer." 33 U.S.C. §933(e)(2) (1976) (emphasis added). Thus, consistent with the equitable nature of the 1959 amendments, Congress added language which would encourage the employer to pursue an employee's third-party claim. In the event of recovery, the amended language rewards the employer with twenty percent (one-fifth) of that portion of the third-party recovery not already allocated to the employer under §33(e)(1).

Contrary to the language and intent of §33(d) and §33(e)(2), WMATA's insurance scheme actually encourages the employer not to bring suit. WMATA's CIP is specifically designed to save money (*Johnson* decision at p. 19). By having one carrier for all compensation and liability claims, the provisions of §33(d) and §33(e)(2) are made meaningless for all injuries which are covered by the plan. In amending §33(b), Congress clearly could not have foreseen a scheme which undermines other subsections of §33. The different provisions of §33 can only be examined as a whole, for this section contains an entire network of checks and balances designed to protect both the interests of the injured worker and his employer. WMATA's insurance plan interferes with this statutory plan by rendering meaningless the provisions of §33(d) and §33(e), which protect the rights of the employee even after a statutory assignment under §33(b).

CONCLUSION

Petitioner respectfully submits that the filing of a third party action against one third party tortfeasor before the expiration of the statutory assignment period precludes the assignment of Petitioner's right of action as to additional third party tortfeasors. Therefore, pursuant to §33(b) no assignment has occurred. In the alternative, Petitioner claims that he has shown "specific evidence of a serious conflict of interest Congress could not have foreseen when it enacted and amended §33(b)," (*Rodriguez* at 618), and the action herein should not be barred by the assignment provisions of §33(b). For the above stated reasons, Petitioner respectfully requests that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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November 1983

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

GLENWOOD WILLIAMS, Plaintiff,	)	
v.	)	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, Defendant.	)	Civil Action No. 82-0999

MEMORANDUM AND JUDGMENT

This matter is before the court for resolution of defendant WMATA's motion for summary judgment. Defendant WMATA has moved for summary judgment on two main grounds: 1) plaintiff's cause of action is barred by the applicable statute of limitations, and 2) plaintiff's cause of action is barred by certain provisions of the District of Columbia Workmen's Compensation statute. In support of the second prong of its motion, WMATA has referred this court to two recent decisions of this district court which basically hold that WMATA's mandatory purchase of workmen's compensation insurance for its employees entitles it to immunity from personal injury suits by those same employees. *See Johnson v. Bechtel Associates, et al.*, No. 81-0963 (D.D.C. August 24, 1982); *Eighmey v. Bechtel Associates, et al.*, No. 81-1261 (D.D.C. July 30, 1982). Plaintiff has cited one case from a Florida state appellate court which holds to the contrary. *See Fiore v. Royal Painting Company, Inc.*, 398 So.2d 863 (Fla. App. April 28, 1981). After considering the materials submitted on this motion, together with the arguments of counsel, this

court believes that it must follow the recent decisions made by other members of this district. The opinions of Judge Corcoran and Judge Green appear both well-supported and well-reasoned. This being so, the court need not discuss any of WMATA's alternative arguments and summary judgments must now be entered for defendant WMATA in this case.

On the basis of the foregoing, it is, by the court, this 5th day of October, 1982,

ORDERED ADJUDGED and DECREED that defendant WMATA's motion for summary judgment is hereby granted.

/s/
UNITED STATES DISTRICT JUDGE

FILED
OCT 6 1982
JAMES F. DAVEY, Clerk

Notice: This opinion is subject to formal revision before publication in the Federal Reporter or U.S.App.D.C. Reports. Users are requested to notify the Clerk of any formal errors in order that corrections may be made before the bound volumes go to press.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-2017

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-1784

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., ET AL.

No. 82-1809

CALVIN WALKER, ET AL., APPELLANTS

v.

BECHTEL CIVIL AND MINERALS, INC., ET AL.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

No. 82-1813

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-1899

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2062

CALVIN WALKER and RENA WALKER, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2063

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2148

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2374

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2458

PAUL D. JOHNSON, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2459

JAMES H. BUCHANAN and SHIRLEY BUCHANAN, his wife, APPELLANTS

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2525

STANLEY WILMES, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2529

CALVIN WALKER, ET AL., APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

No. 82-2530

JOHN WARREN CLANAGAN, APPELLANT

v.

BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C., ET AL.

No. 82-2531

HOWARD L. EIGHMEY, ET AL., APPELLANTS

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY, ET AL.

No. 83-1003

GLENWOOD WILLIAMS, APPELLANT

v.

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Appeals from the United States District Court
for the District of Columbia

(D.C. Civil Action Nos. 81-00963, 81-01261, 81-01125, 81-01481, 81-00114, 81-03057 and 82-00999)

Argued March 28, 1983

Decided August 19, 1983

Peter J. Vangsnes and *William F. Mulroney*, with whom *James M. Hanny* and *Michelle A. Partiff* were on the brief, for appellants. *Michael H. Feldman*, also entered an appearance for appellants.

Gary W. Brown, with whom *James F. Bromley*, *James W. Greene*, *William G. Schaefer* and *Ronald Flagg* were on the brief, for appellees, Bechtel Associates Professional Corporation, et al. *Catherine H. Lesica* and *Elaine L. Johnston*, also entered appearances for appellees, Bechtel Associates Professional Corporation, et al.

Vincent H. Cohen, with whom *Robert B. Cave* was on the brief, for appellee, Washington Metropolitan Area Transit Authority.

Robert L. Ellis, *Edward J. Lopata*, *J. Joseph Barse*, *F. Wainwright Barnes*, and *Laurence T. Scott* were on the joint brief of amici curiae, Metro Subway Construction Contractor/Employers.

Before: ROBINSON, *Chief Judge*, WRIGHT, *Circuit Judge* and MACKINNON, *Senior Circuit Judge*.

Opinion for the Court filed by *Senior Circuit Judge* MACKINNON.

MACKINNON, *Senior Circuit Judge*: These consolidated appeals [1] arise from negligence actions instituted by employees of contractors who performed underground work on the Washington Metropolitan Area Transit subway project (Metro). With the exception of Eighmey who was injured in a construction accident, the appellants allegedly sustained respiratory injuries as a result of exposure to high levels of silica dust and other industrial pollutants in the subway project. The injured employees all filed workmen's compensation claims and received compensation awards. The employees then instituted third-party negligence actions against either the Washington Metropolitan Area Transit Authority (WMATA or the Authority) [2] or Bechtel, [3] the safety engineer for the project.

Because of the nature of the contractual relationship between the parties, WMATA or Bechtel appeared to be a proper third-party defendant. WMATA exercises the ulti-

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[1] Because of the similarity of issues in the numerous actions growing out of the WMATA construction, the court ordered these appeals consolidated and expedited. Johnson v. Bechtel Assoc. Prof. Corp., No. 82-2017 (D.C. Cir. Jan. 7, 1983).

[2] The Washington Area Metropolitan Transit Authority (WMATA or the Authority) is a legal entity created by and deriving its authority from an interstate compact (Compact) entered into by Maryland, Virginia, and the District of Columbia with the consent of Congress. U.S. CONST. art. I, § 10, cl. 3. WMATA was formed to develop and operate a transit system (Metro) in the District of Columbia metropolitan area. Pub. L. No. 89-774, 80 Stat. 1324 (1966) (codified at D.C. Code § 1-2431 (1981)). The Authority may sue and be sued. Compact § 12.

[3] Two Bechtel entities were sued in the district court actions, Bechtel Civil and Minerals, Inc., a Nevada corporation, and its local affiliate, Bechtel Associates Professional Corporation. The two corporations are indistinguishable for the purposes of these appeals and therefore will both be referred to simply as "Bechtel."

mate control of and authority for the construction and operation of the subway system. WMATA contracted with Bechtel to provide safety engineering services. Contracts for the actual construction work were awarded to a variety of subcontractors. Appellants were employees of these subcontractors.

In the district court each defendant, WMATA or Bechtel, moved for and was granted summary judgment. Appellants contest these judgments and present four issues for our resolution. We discuss each issue separately and conclude:

(1) Bechtel was an agent of WMATA and therefore, under section 80 of the Compact, WMATA is exclusively liable for Bechtel's torts. Accordingly we affirm the grant of summary judgment to Bechtel on this issue.

(2) WMATA is not entitled to the immunity accorded to employers under section 905(a) of the Longshoremen's Act. Accordingly we reverse the grant of summary judgment to WMATA on this issue.

(3) A more complete factual record is necessary to determine whether, under FED. R. CIV. P. 15(c), WMATA was properly added as a defendant. Accordingly we remand these cases.

(4) Under section 33(b) of the Longshoremen's Act an injured employee cannot institute a third-party negligence action after the expiration of the six-month period following acceptance of a compensation award. Accordingly we affirm the dismissal of the *Williams* case.

I. SECTION 80 OF THE WMATA COMPACT

Defendant Bechtel based its motion for summary judgment upon section 80 of the WMATA Compact.[4] Section 80 establishes WMATA's contract and tort liability and provides:

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[4] *See* note 2 *supra*.

> The Authority shall be liable for its contracts and for its torts and those of its Directors, officers, employees and agent committed in the conduct of any proprietary function, in accordance with the law of the applicable signatory (including rules on conflict of laws), but shall not be liable for any torts occurring in the peformance of a governmental function. The exclusive remedy for such breach of contracts and torts for which the Authority shall be liable, as herein provided, shall be by suit against the Authority. Nothing contained in this Title shall be construed as a waiver by the District of Columbia, Maryland, Virginia and the counties and cities within the Zone of any immunity from suit.

Bechtel asserted that it functioned as an "agent" of WMATA when performing its safety duties, and was therefore entitled to immunity from negligence actions by operation of section 80 of the Compact. Bechtel argued that WMATA was exclusively liable for any work-related tortious injury suffered by the employees. Each district court which considered this issue found that Bechtel was an agent of WMATA within the meaning of section 80 and granted summary judgment.[6] We affirm the judgments of the district courts on this issue.

A. *Legal Standard*

While conceding that, in its role as safety engineer, Bechtel was an agent of WMATA within the "broadest terms," appellants nevertheless assert that the term "agent" in section 80 of the Compact should be given a narrow construction. Appellants attempt to remove

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[6] Appellants challenge the grant of summary judgment on the section 80 issue in the following cases: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. July 21, 1982); Walker v. Bechtel Civil and Minerals, Inc., No. 81-1125 (D.D.C. July 8, 1982); Clanagan v. Bechtel Assoc. Prof. Corp., No. 81-1481 (D.D.C. July 8, 1982); Eighmey v. Bechtel Civil and Minerals, Inc., No. 81-1261 (D.D.C. June 21, 1982).

Bechtel from the operation of section 80 by arguing that Bechtel was an "independent contractor"-agent and, therefore, not within the class of "servant"-agents for whom a principal is vicariously liable. However, this attempted distinction, based primarily upon the Restatement (Second) of Agency (1958), fails because resolution of this issue turns on the use of the word "agent" within a statute expressly designed to shift liability exclusively to the principal, WMATA.[6] While resort to the Restatement may be informative, it is not dispositive; instead, we look to the statute itself.

The use of the word "agent" in section 80 is unqualified[7] and there is no reason, under these circumstances,

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[6] Appellants' reliance on the Restatement is misplaced. While the Restatement does distinguish between "servants" and "independent contractors" for some purposes, it also makes clear that both "servants" and "independent contractors" may be agents. Restatement (Second) of Agency § 2 (1958).

Section 251 of the Restatement, applied to the situation herein, obviates the need for any distinction between "servants" and "independent contractors" or "non-servants agents."

> § 251. Liability for Physical Harm Caused by a Servant or a Non-servant Agent
>
> A principal is subject to liability for physical harm to the person . . . of another caused by the negligence of a servant or a non-servant agent:
>
> (a) in the performance of an act which the principal is under a duty to have performed with care . . . .

Restatement (Second) of Agency § 251 (1958).

WMATA, the principal, had a duty to protect workers from physical harm caused by the construction of Metro. By entrusting the performance of that duty to an agent (Bechtel), WMATA is liable for any harm caused by its agent's negligence, regardless of whether the agent was a servant or an independent contractor. *See* Restatement (Second) of Agency § 251 comment (a) (1958).

[7] Appellants suggest that the legislative history of the Compact reveals that the term "agent" was intended to have an extremely narrow meaning. The only "legislative history"

for distinguishing between "independent contractors" who are agents and "servants" who are agents. Guided by accepted rules of statutory construction and noting that there is no indication that the drafters of the Compact intended to use "agent" in a restrictive manner, we accord the term its common and usual meaning. *Diamond v. Diehr*, 450 U.S. 175, 182 (1981) ("Unless otherwise defined, 'words will be interpreted as taking their ordinary, contemporary, common meaning,' *Perrin v. United States*, 444 U.S. 37, 42 (1979) . . . .").

An agent is one who is authoized by another (principal) to act on his behalf. An agent-principal relationship is characterized by the presence of two elements. First, there must be an indication by the principal that the agent will act on his behalf and subject to his control. And second, there must be a manifestation of consent by the agent so to act. Restatement (Second) of Agency

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cited by appellants is a Senate Judiciary Committee Staff paper which, appellants purport, explains the purpose of section 80.

> *Liability for Contracts and Torts*
>
> (Article XVI sec. 80)
>
> This would make the Authority [WMATA] liable for its contracts and torts and the torts of its *personnel* (emphasis added) committed in the conduct of any *proprietary* function, in accordance with the law of the applicable signatory (including rules on conflict of laws). It would absolve the Authority from liability for torts occurring in the performance of a *governmental* function, and provides that this section would not constitute a waiver by any of the signatories or their subjurisdictions of any immunity from suit.

Ludolph Brief at 22.

Based upon this statement, appellants argue that the intent of section 80 was to immunize only *individuals* acting as agents and not "large corporate entities such as Bechtel." This argument is not persuasive. The "legislative history" relied upon is little more than a loose restatement of the statute. Without more, such statements cannot serve to narrow the meaning of an unambiguous statutory term.

§ 1 (1958); *Rose v. Silver*, 394 A.2d 1368 (D.C. App. 1978). *Accord Lott v. Burning Tree Club, Inc.*, 516 F. Supp. 913, 917 (D.D.C. 1980) (Police are not agents of Country Club because not designated as such and Club exercised no *control* over the police.). The extent of control and consent is evidenced both by the terms of the contract and by the actual dealings between the parties. Applying the foregoing legal standards, we examine the contract between Bechtel and WMATA and the actual on-the-job practice.

B. *The WMATA-Bechtel Relationship*

WMATA contracted with Bechtel to administer the safety program on the entire subway construction project.[8] Taken as a whole, the contract provides that Bechtel shall act on behalf of and subject to the authority of WMATA. Numerous provisions of the contract specify the exact nature and extent of control which WMATA exercises over Bechtel. For example, Paragraph 1 of the Scope of Services portion of the WMATA-Bechtel contract provides:

> The [WMATA] Contracting Officer shall be kept fully informed of all operations under this contract and [Bechtel] shall have authority to conduct these operations for and in the name of the Authority [WMATA], subject to the approval of the [WMATA] contracting officer.

Article XVI of the General Provisions section of the Contract provides:

> The extent and character of the work to be done by [Bechtel] shall be subject to the general supervision, direction, control and approval of the [WMATA]

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[8] The annual contracts executed by WMATA and Bechtel from 1971 until the present did not change significantly from year-to-year. The relevant portions of these contracts are exhibits in the district court record in Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, and all references to the contracts are to the district court record.

> Contracting Officer and the authorized representative of the Contracting Officer to whom [Bechtel] shall report and be responsible.

In addition to specifying the general working relationship, the WMATA-Bechtel contract provides that all personnel hired by Bechtel for the WMATA project must be approved by WMATA. General Provisions, Art. IX. The salaries of these employees are also subject to approval by WMATA. Special Provisions, Sec. III. Once WMATA approves a Bechtel employee to serve as an on-site Resident Engineer, Bechtel cannot transfer, reassign, or fire him without the Authority's approval.[9]

The allocation of authority and responsibility between WMATA and Bechtel is further specified in the Coordirated Safety Program & Reporting Procedures Manual which is specifically incorporated into the WMATA-Bechtel contract. The Safety Manual provides that a full-time WMATA employee, the Contracting Officer, has primary responsibility for overseeing the safety-related aspects of the project. Another WMATA official, the Safety Engineer, is charged with evaluating and directing the activities of the Bechtel Safety Department. Taken as a whole, the WMATA-Bechtel contract provides for extensive and pervasive control by WMATA over Bechtel personnel.

The actual day-to-day work performed by Bechtel on the construction sites reinforces the conclusion that Bechtel serves as WMATA's agent.[10] On the job site the Resident Engineer, a Bechtel employee, represents WMATA

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[9] At a hearing conducted by the district court in Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, on May 17, 1982, John S. Egbert, Assistant General Manager for Design and Construction for WMATA (Contracting Officer), testified to the working relationship between WMATA, Bechtel, and the subcontractors. The relevant testimony is contained in Appellees Record Excerpts 22-23, 31, and 51.

and is responsible for ensuring that the various contractors comply with WMATA safety regulations. In the discharge of his duties, Bechtel's Resident Engineer is subject to the direction of the WMATA Contracting Officer from whom he receives both written and verbal instructions. Although the Resident Engineer is authorized to direct correction of safety violations, in practice he rarely takes any major action without first consulting WMATA. The Resident Engineers carry business cards identifying them as "Authorized Representative[s] of the Contracting Officer," *i.e.*, WMATA. In their daily work, the Bechtel safety personnel are subject to the direction of WMATA officials and function essentially as WMATA employees.

C. *Conclusion*

It is unimportant whether the WMATA-Bechtel relationship was a master/servant agency relationship or a principal/independent contractor agency relationship. "Agent," as used in the Compact, is unqualified and, therefore, embraces both types of agency relationships.

To determine if a party is an "agent" within the broadest meaning of the term, the court looks to the entirety of the relationship for evidence of *consent* between the parties to establish a principal-agent relationship and for evidence of the degree of *control* exercised by the principal. The district courts correctly concluded that both mutual consent and a sufficient degree of control were present in the WMATA-Bechtel relationship to establish that Bechtel acted as an agent of WMATA. By the terms of section 80 of the Compact, therefore, WMATA is exclusively liable for the torts of its agent, Bechtel. We affirm the grant of summary judgment to Bechtel on this issue.

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[10] *See* note 9 *supra*.

II. Section 905 of the Longshoremen's and Harbor Workers' Compensation Act

At the time of their alleged injuries, the appellants were employed by construction companies under contract to WMATA to construct specific segments of the Metro project. These subcontractors did *not* purchase workmen's compensation insurance for their employees; instead WMATA purchased such insurance to cover all laborers and other employees working on the Metro system. After sustaining an injury, each employee filed for and received workmen's compensation benefits. Exercising their statutory right to sue a third-party tortfeasor, several of the injured employees instituted an action against WMATA.

WMATA responded with a motion for summary judgment, asserting that because it obtained and paid for the workmen's compensation insurance required by section 904(a)[11] of the Longshoremen's and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et seq.* (1976 & Supp. V 1981),[12] it was entitled to the statutory immunity accorded to an "employer" under section 905(a).[13] Each federal district court which considered

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[11] The Act, 33 U.S.C. § 904(a) (1976), provides:

> (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 907, 908 and 909 of this title. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to the employees of the subcontractor unless the subcontractor has secured such payment.

[12] The District of Columbia Workers' Compensation Act, D.C. Code § 36-501 *et seq.* (1973), adopted the provisions of the federal Longshoremen's and Harbor Workers' Compensation Act. For simplicity, the Act will be referred to by the federal statute section numbers.

[13] 33 U.S.C. § 905(a) (1976) provides:

this question granted summary judgment in favor of WMATA.[14] We reverse.

In reaching their decisions, the district courts relied exclusively upon the fact that WMATA furnished the workmen's compensation insurance, accepting the argument that section 904(a) employer immunity is a *quid pro quo* for providing such insurance. The courts premised their *quid pro quo* conclusion upon the assumption that WMATA was *legally required* to purchase the compensation insurance. A closer analysis of the language and purpose of the Act and the relevant case law leads to the conclusion that in these circumstances WMATA was not *required* to provide the compensation insurance. Furthermore, the voluntary provision of such insurance does not entitle the provider to the statutory employer immunity of section 905(a).

To analyze the intended operation of the compensation insurance provisions, one must begin with the overall purpose and design of the Longshoremen's Act. As this court acknowledged in *Potomac Electric Power v. Wynn*, 343 F.2d 295, 296 (D.C. Cir. 1965) (footnote omitted):

> The Longshoremen's and Harbor Workers' Compensation Act must be construed liberally in favor of the injured employee. Narrow statutory construction

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(a) The liability of an employer prescribed in section 904 of this title shall be exclusive and in place of all other liability of such employer to the employee . . . .

[14] Appellants challenge the grant of summary judgment on the section 905(a) issue in the following cases: Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. Nov. 19, 1982); Williams v. Washington Area Metropolitan Transit Auth., No. 82-0999 (D.D.C. Oct. 6, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. Sept. 2, 1982); Walker v. Washington Metropolitan Area Transit Auth., No. 81-1125 (D.D.C. Sept. 2. 1982); Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. Aug. 24, 1982); Eighmey v. Bechtel Assoc. Prof. Corp., No. 81-1261 (D.D.C. July 30, 1982).

> should not deprive the injured employee of either his compensation or his claim in damages against third parties.

This overriding purpose underlies our interpretation of sections 904 and 905 of the Act.

The Act is designed to insure that all employees are covered by worker's compensation insurance and will thereby receive prompt compensation for work-related injuries. To assure the availability of compensation, employers are required to carry insurance. 33 U.S.C. § 932 (1976). Failure to do so may result in criminal sanctions. *Id.* § 938. In return for carrying the required insurance, an employer is absolved from all other liability, even if the employee's injury is attributable to employer negligence. *Id.* § 905. In the scheme of the Act, not only is the employee entitled to prompt compensation payments, but he also retains the right to sue any third party whose negligence may have caused or contributed to his injuries. *Id.* § 933. When a job involves a general contractor and subcontractors, the Act requires the subcontractor to obtain the workmen's compensation insurance. *Id.* § 904. The general contractor is not obligated to obtain insurance "unless" the subcontractor fails to do so. *Id.*

While the Act does not expressly designate who obtains section 905 employer immunity when a general contractor and subcontractor are involved, courts have allowed a general contractor to invoke the statutory immunity *only* when he was *legally required to*, and did in fact, provide workmen's compensation insurance. When both the general contractor and the subcontractor carry workmen's compensation insurance, courts have held that *only* the subcontractor is entitled to statutory immunity. The general contractor is denied section 905(a) immunity because he is not *statutorily* required to carry insurance. *Thomas v. George Hyman Const. Co.*, 173 F. Supp. 381 (D.D.C. 1959). *Accord DiNicola v. George Hyman Const. Co.*, 407 A.2d 670, 674 (D.C. App. 1979) ("[T]he

Longshoremen's Act[] impose[s] on the general contractor the duty to secure compensation insurance *only* if the subcontractor has failed to do so."); *Probst v. Southern Stevedoring Co.*, 379 F.2d 763, 766 (5th Cir. 1967) ("[T]he structure of §§ 904, 905 . . . add up to show that the provision imposing on the general contractor compensation liability to an employee of a subcontractor is a secondary, protective one.").[15]

A fundamental premise of the compensation insurance scheme is that the general contractor's statutory duty to

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[15] *Probst* expressly reserved

> the question of what ought to be done if the general contractor, or general employer, is actually *required* to pay compensation benefits to the injured employee of the subcontractor under § 904.

379 F.2d at 767 (footnote omitted) (emphasis added). However, the question left open in *Probst* is not the precise issue herein. WMATA was not "required" to obtain workmen's compensation insurance under section 904. WMATA *voluntarily* assumed that responsibility.

The fact that WMATA voluntarily obtained compensation insurance also distinguishes the WMATA case from Fiore v. Royal Painting Co., 398 So. 2d 863 (Fla. Dist. Ct. App. 1981). In *Fiore*, the subcontractor's insurance *lapsed* unbeknownst to the general contractor. Following the work-related death of an employee of the subcontractor, the general contractor payed direct benefits to the decedent's widow and children. In a subsequent wrongful death action, the defendant-contractor moved for and obtained summary judgment based upon section 905(a) employer immunity.

Reversing the grant of summary judgment on appeal, the *Fiore* court held that the general contractor was not entitled to statutory immunity. The court rejected the general contractor's *quid pro quo* argument and construed the Act to allow immunity only to the "actual employer (in this type of situation, a *complying* subcontractor)." *Id.* at 865. The *Fiore* court denied statutory immunity to the general contractor, notwithstanding the fact that his subcontractor had defaulted and the general contractor had in fact assumed his obligation under the statute. *Fiore* represents an extreme interpretation of the Act and is distinguishable on its facts.

secure workmen's compensation insurance is *secondary*. "The general contractor has a *secondary, guaranty-like liability.*" *Probst, supra*, 379 F.2d at 767 (emphasis added). The subcontractor is primarily and initially responsible; the general contractor becomes responsible *only* upon the subcontractor's default. As the court stated in *Thomas v. George Hyman, supra*, 173 F. Supp. at 383:

> The law does not accord to the general contractor the choice of either carrying workmen's compensation insurance, or subjecting himself to liability for negligence. The law requires him to carry insurance *only if the subcontractor fails to do so.* In such a contingency, the general contractor may well be free of all other liability if he in fact carried such insurance. He may not, however, *voluntarily* take out insurance that the law does not require and thereby secure freedom from liability for negligence. . . . Release from common law liability is a benefit accruing from carrying compensation insurance only in case the law imposes a duty to do so. One may not escape from such liability by taking out insurance that the law does not require.

(Emphasis added). This interpretation clearly comports with the plain language of sections 904 and 905, as well as with the overall statutory scheme.

By initially providing the insurance for all employees, WMATA pre-empted the subcontractors' statutory duty to secure such insurance. The language and scheme of the Act, as well as the relevant caselaw, clearly establish that a general contractor may not circumvent the intended operation of the Act by, in effect, choosing between either securing workmen's compensation insurance and thereby obtaining statutory employer immunity, or remaining potentially liable as a third-party tortfeasor. To accord WMATA section 905 employer immunity would frustrate the operation of the Act. WMATA cannot unilaterally decide to purchase the workmen's compensation insurance itself and thereby obtain section 905 im-

munity. To benefit from securing the insurance, WMATA must *first* require its subcontractors to purchase the insurance. It is only by providing compensation insurance *when the subcontractors fail to do so* that WMATA obtains immunity as a statutory employer.

WMATA suggests that its circumstance is analogous to the situation wherein the subcontractor fails to obtain insurance or the subcontractor's insurance lapses. In such instances, the statute provides that the general contractor then becomes responsible for assuring that workmen's compensation insurance is provided. However, WMATA's circumstance is not analogous. WMATA did not follow the statutory scheme; instead it pre-empted the proper functioning of the scheme. WMATA, the general contractor, *initially* provided the workmen's compensation insurance when it was under *no legal duty* to do so; the Authority thereby supplanted its subcontractors' primary, statutory duty.

WMATA attempts to justify its actions by explaining that its wrap-up insurance plan was "the only effective way to ensure that all employees would be covered by compensation insurance at all times." WMATA Reply Brief at 27. WMATA contends that after attempting to require all subcontractors to provide workmen's compensation insurance, it found the task impossible to administer. Therefore, after 1971 WMATA instituted a "coordinated insurance plan" whereby it purchased workmen's compensation insurance for all employees of all subcontractors. Although WMATA asserts that it was primarily concerned with fulfilling its section 904 duty, the Authority also reveals that the wrap-up insurance program "substantially lessen[ed] [its] administrative burden and effectuat[ed] a substantial savings in costs." WMATA Reply Brief at 27-28. That it was more convenient and cost effective to carry the insurance does not excuse deviation from the statutory scheme. Nor does the size of the project affect the intended operation of the statutory

provisions. WMATA had no statutory duty to provide insurance until and unless a subcontractor failed in its primary obligation to provide such insurance.

The problems caused by WMATA's deviation from the statutory scheme are evident in these cases. To the injured employees it appeared that their respective employers provided the workmen's compensation insurance. Therefore, when compensation claims were filed and paid, the employees reasonably assumed that under section 905(a) of the Act their immediate employer could not be sued for negligence. Consequently, the employees attempted to exercise their statutory right to a third-party action by instituting suit against WMATA. Only then did it become clear who had actually secured and paid for the compensation insurance. For some employees this discovery came too late to institute suit against their immediate employer who might have been a third-party defendant if WMATA was entitled to section 905. employer immunity. The net effect of this scenario was to confuse and confound the injured employee whom the Act was designed to protect. With the statute of limitations running on his third-party claim, it was unclear to the injured employee which entity, if not both, would be entitled to employer immunity.

The language and purpose of sections 904(a) and 905(a) of the Longshoremen's and Harbor Workers' Compensation Act, as well as the relevant case law, compels the conclusion that WMATA be denied statutory employer immunity.[16] The Act clearly contemplates that an injured employee can receive compensation benefits and have the right to bring a third-party action. We will not immunize a potential third-party defendant when the only basis for so doing rewards that party for circumventing the statutory scheme. Notwithstanding the fact that it

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[16] We express no opinion on the issue whether the *subcontractors* have "secure[d]" compensation insurance under section 904(a) and would thereby be entitled to immunity.

provided the workmen's compensation insurance, WMATA is amenable to suit as a potentially liable third-party tort-feasor. The grants of summary judgment to WMATA are reversed.

III. Rule 15(c) of the Federal Rules of Civil Procedure

In four of the seven actions on appeal, the employees first sued Bechtel and subsequently added WMATA as a defendant by amending their complaint[17] pursuant to Rule 15(c) of the Federal Rules of Civil Procedure.[18]

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[17] In the following cases the district courts allowed the plaintiff to amend his complaint to add WMATA as a defendant: Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963 (D.D.C. May 18, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057 (D.D.C. July 7, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481 (D.D.C. July 8, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. July 13, 1982).

In *Wilmes*, the plaintiff also sought to amend his complaint via Rule 15(c) to add the subcontractors as defendants. The district court denied plaintiff's motion to amend. Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. Dec. 16, 1982). Wilmes appeals this denial and for the reasons stated in this section of our opinion, we remand this aspect of the case also. A more complete factual record is a prerequisite for review of a Rule 15(c) decision.

[18] Rule 15(c) of the Federal Rules of Civil Procedure provides:

> (c) Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading. An amendment changing the party against whom a claim is asserted relates back if the foregoing provision is satisfied and, within the period provided by law for commencing the action against him, the party to be brought in by amendment (1) has received such notice of the institution of the action that he will not be prejudiced in maintaining his defense on the merits,

In each instance, WMATA moved for summary judgment on two alternative grounds. First, WMATA asserted that it was not a proper defendant because the requisites of Rule 15(c) were not satisfied. Second, WMATA argued that under section 905(a) of the Longshoremen's Act it was immune from suit as a statutory employer. In each case the district court granted summary judgment for WMATA on the section 905(a) ground and expressly declined to address the Rule 15(c) issue.[19] WMATA seeks to justify the grant of summary judgment in its favor by reurging the contention that it was not properly added as a defendant.

Rule 15(c) permits an amendment adding a party to relate back to the date of the original pleading if three conditions are met: (1) the claims against the new party must arise out of the same occurrence as the claims in the original pleading; (2) the new party must have received "notice of the institution of the action" before the limitations period expired; and (3) the new party must know "or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him." *Norton v. International Harvester Co.*, 627 F.2d 18, 20 (7th Cir. 1980); *Hernandez Jimenez v. Calero Toledo*, 604 F.2d 99, 102-03 (1st Cir. 1979). To permit the addition of a party via a Rule 15(c) amendment, the court must be satisfied that all three tests are met.

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and (2) knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against him.

[19] Johnson v. Bechtel Assoc. Prof. Corp., No. 81-0963, slip op. at 1 (D.D.C. Aug. 24, 1982); Clanagan v. Washington Metropolitan Area Transit Auth., No. 81-1481, slip op. at 6 n.2 (D.D.C. Sept. 3, 1982); Buchanan v. Bechtel Assoc. Prof. Corp., No. 81-3057, slip op. at 2 (D.D.C. Nov. 19, 1982); Wilmes v. Washington Metropolitan Area Transit Auth., No. 81-0114 (D.D.C. 16, 1982).

WMATA argues that two of the Rule 15(c) criteria were not satisfied and, therefore, that it was improperly made a defendant. First, WMATA notes that the amended complaints adding it as a defendant were filed after the statute of limitations on the underlying tort had run. While Rule 15(c) removes a statute of limitations bar by allowing the amended complaint to "relate back" to the date of the original filing, the party to be added must have received sufficient "notice" of the action so that it is not prejudiced in maintaining a defense. WMATA contends, *inter alia*, that it received notice only upon the actual filing of the amended complaint and that because that filing was made after the expiration of the statute of limitations, such notice is *per se* insufficient. Plaintiffs-appellees counter that because of the "identity of interests" between WMATA and Bechtel, WMATA received constructive notice prior to the expiration of the statutory period. In addition, plaintiffs-appellees assert that WMATA has not been prejudiced by receiving such belated notice. WMATA also contends that the "mistake" requirement of Rule 15(c) was not satisfied because the plaintiffs did not initially make a "mistake" regarding the proper party to be sued, but rather made a tactical decision to sue Bechtel. Plaintiffs-appellees assert that they did in fact make a reasonable legal "mistake" in choosing the original defendant.

Because resolution of these issues in the context of a Rule 15(c) decision involves inherently factual determinations, a complete factual record is required. *McCurry v. Allen*, 688 F.2d 581, 585 (8th Cir. 1982) (Remanded for an evidentiary hearing and findings of fact because "[t]he requirements of Rule 15(c) raise factual issues not susceptible to determination at the appellate level."); *Ringrose v. Engelberg Huller Co.*, 692 F.2d 403 (6th Cir. 1982). Furthermore, on the motion for summary judgment each district court expressly declined to reach the Rule 15(c) issue. This court will not, therefore, resolve this issue notwithstanding the fact that it has been briefed and argued. We express no opinion on the resolution of

this issue, leaving the matter in the first instance to the district courts. The cases are remanded for the development of an adequate factual record and a ruling by the district courts on the propriety of adding WMATA as a defendant by a Rule 15(c) amendment.

IV. Section 933(b) of the Longshoremen's and Harbor Workers' Act

On August 28, 1981, appellant Williams received a lump-sum workmen's compensation award. More than six months later, on April 1, 1982, Williams instituted a third-party negligence action against WMATA. The district court dismissed Williams' action because it was not filed within the six-month statutory period as provided in 33 U.S.C. § 933(b).[20] *Williams v. Washington Metropolitan Area Transit Auth.*, No. 82-0999 (D.D.C. Oct. 6, 1982). Williams challenges the district court's dismissal of his action and attempts to excuse his delay in instituting suit by relying upon the so-called "*Czaplicki* exception," fashioned by the Supreme Court in *Czaplicki v. The Hoegh Silvercloud*, 351 U.S. 525 (1956).

In *Czaplicki*, an injured employee accepted a workmen's compensation award which, under the statute as it existed then, effected an automatic assignment of his third-party claims to his employer. In turn, his employer's insurer was subrogated to the employer's rights. Seven years after receiving the compensation award, when no third-party action had been filed, Czaplicki instituted a negligence action against several potentially liable third-

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[20] Section 33(b) of the Longshoremen's Act, 33 U.S.C. § 933(b) (1976), provides:

> Acceptance of such compensation under an award in a compensation order filed by the deputy commissioner or Board shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person unless such person shall commence an action against such third person within six months after such award.

parties. Czaplicki's employer and one of the third-party defendants were insured by the same company, Travelers Insurance Company. Recognizing that the substantial conflict of interests inherent in this circumstance made it extremely unlikely that the insurer would proceed against this third-party, the *Czaplicki* Court held that section 33 (b) did not prevent the employee from pursuing his third-party action. The Court reasoned that in order to insure that a party with sufficient adversarial interests remained to institute a third-party action, the employee would be permitted to maintain his action, notwithstanding the fact that he had accepted an award of compensation. The *Czaplicki* Court found it significant that there was "no other procedure by which [the employee could] secure his statutory share in the proceeds, if any, of his right of action." *Id.* at 532-33.

In 1959, after *Czaplicki*, Congress amended the relevant provisions of the Act to their present form by eliminating the election requirement under subsection (a), postponing assignment of the claim under subsection (b) until six months after acceptance of a compensation award, and allowing the assignee to retain twenty percent of any excess recovery as a financial incentive to pursue a third-party action. Act of August 18, 1959, Pub. L. No. 86-171, 73 Stat. 391. Under the statute as amended, an injured employee is not required to elect between receiving a workmen's compensation award and seeking damages from a third party. 33 U.S.C. § 933(a). The employee may accept a compensation award and, as long as he acts within six months, institute an action against any potentially liable third party. If, however, he fails to institute suit within six months, acceptance of the compensation award acts as an assignment to the employer of any and all third-party claims which the employee might have. *Id.* § 933(b). The insurer of the employer continues to be subrogated to all rights of the employer. *Id.* § 933(h).

Following amendment of the Act, the Supreme Court held, in *Rodriquez v. Compass Shipping Co.*, 451 U.S. 596 (1981), that failure to institute a third-party action within the statutory six-month period was an absolute bar to a subsequent action by the employee. Although *Rodriquez* did not involve a *Czaplicki* conflict-of-interest and the Court expressly declined to reach the *Czaplicki* scenario,[21] the opinion for the Court cast serious doubt upon the viability of the *Czaplicki* conflict-of-interest exception. The *Rodriquez* Court was careful to confine *Czaplicki* to the "peculiar facts" of that case and emphasized the importance of the intervening amendments in alleviating the hardship which existed in the *Czaplicki* circumstance. The Court stated:

> [T]he 1959 and 1972 Amendments have substantially undercut the basis for the *Czaplicki* exception to § 33(b). The Court was troubled in *Czaplicki* because under the Act in 1956 there was "no other procedure" by which a longshoreman could enforce his rights against a third party where the employer failed to sue due to a conflict of interest. 351 U.S., at 532-533. After the 1959 amendments, there is such a procedure: the employee may simply file his own third-party suit within six months after accepting compensation.

Rodriquez, supra, 451 U.S. at 617 n.41. Relying upon the express statutory language, the *Rodriquez* Court emphasized the mandatory nature of the assignment which occurs after the six-month period. "Congress unequivocally made the choice in favor of first giving the em-

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[21] In a footnote the *Rodriquez* Court stated:

> Whether the statutory language [section 33(b)] provides the exclusive solution for unusual conflict-of-interest problems, such as that identified in *Czaplicki*, is a question that is not presented on the facts of these cases. We accordingly do not decide whether, or to what extent, *Czaplicki* survived the 1959 amendments.

451 U.S. at 612 n.30.

ployee exclusive control of the cause of action for a 6-month period and then giving the employer exclusive control thereafter, instead of opting for any form of simultaneous joint or partial control." *Id.* at 612. Finally, the Court reasoned that the legislative history "forecloses the argument that Congress did not intend an assignment of a third-party claim to be effective unless there was an absence of any potential conflict of interest between the assignee and the [employee]." *Id.*

Considering *Czaplicki*, *Rodriquez*, and the statute as it exists today, we conclude that the *Czaplicki* exception no longer permits an employee to institute a third-party action after the six-month statutory window.[22] Given the statutory language and legislative history relied upon by the *Rodriquez* Court, it is apparent that reading a *Czaplicki* exception into the section 33(b) assignment scheme would frustrate the balance struck by Congress between the employer's and employee's interests. That balance alleviates the hardship which *Czaplicki* was crafted to remedy. Acceptance of a compensation award no longer automatically assigns the employee's third-party claims to his employer. Where the employee suspects a potential *Czaplicki* conflict-of-interest he has six months after accepting a compensation award within which to institute suit himself.

For the foregoing reasons, we do not think that the *Czaplicki* exception survived the post-*Czaplicki* amendment of the Act and *Rodriquez*. Plaintiffs who accept

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[22] Our decision is in accord with an earlier decision by a panel of this court, Phillippi v. Bechtel Assoc. Prof. Corp., No. 82-1615 (D.C. Cir. Feb. 24, 1983), and with two unpublished memorandum opinions by district courts in this Circuit. Phillippi v. Bechtel Assoc. Prof. Corp., No. 81-1154 (D.D.C. April 28, 1982) and Jenkins v. Bechtel Assoc. Prof. Corp., No. 81-2236 (D.D.C. Feb. 23, 1982). The District of Columbia Court of Appeals has also recently repudiated the conflict-of-interest exception. Thomas Westbrook v. Hutchinson Crane Ecavating Co., No. 82-1151 (D.C. App. June 30, 1983).

compensation awards must comply with section 33(b) and institute any third-party claims within six months of accepting such award. Because Williams failed to institute his action within the statutory time frame the district court properly dismissed the action. The fact that both parties were insured by the same compensation carrier does not excuse the plaintiff's delay in instituting his third-party claim. The judgment of the district court is affirmed.

V. Conclusion

The Clerk is directed to issue judgments in the respective cases in accordance with the foregoing opinion.

APPENDIX C

DAVID B. SIMON, M.D.
916 - 19t Street, N.W.
Suite 420
Washington D.C. 20006

Telephone 861-0247

February 11, 1980

William F. Mulroney
Ashcraft, Gerel and Koonz
Suite 303
2101 L Street, N.W.
Washington, D.C. 20037

re: Glenwood Williams

Dear Mr. Mulroney:

I am in receipt of the slides from the lung biopsy performed on Glenwood Williams at Howard University Hospital. I have given these slides to Dr. Abraham of the Department of Pathology at the George Washington University Hospital for review and interpretation. Enclosed is his report. As you can see, he is interpreting the lung tissue fragments to be consistent with silicosis in that there is not only advanced fibrosis but there are needle shaped doubly refractile crystalline material within the granulomata and in the histiocytes of lung tissue.

In review of x-rays in my possession, taken March 23, 1979, there is evidence of dense fibrosis. By x-ray one cannot differentiate sarcoidosis from silicosis. However, with the tissue material, there is definite evidence of silicosis and this diagnosis may be accounting for the entire x-ray picture and symptoms Mr. Williams is experiencing. It is

also possible that he has sarcoidosis and may be having both illnesses currently. However, from the work-relatedness point of view, there is definite evidence of silicosis. This is consistent with his occupational exposure of a hard rock miner and I suspect on several occasions he had heavy exposure to silica dust.

If further information is needed, please contact my office.

Sincerely yours,
/s/ David B. Simon
David B. Simon, M.D.

DBS:ds

APPENDIX D

U.S. DEPARTMENT OF LABOR
Employment Standards Administration
Office of Workers' Compensation Programs

GLENWOOD WILLIAMS
Claimant

v.

BALL-HEALY-GRANITE
Employer

NATIONAL LOSS CONTROL
Insurance Carrier

COMPENSATION ORDER

APPROVAL OF AGREED SETTLEMENT - Section 8(1)(A)

Case No. 132015

Pursuant to agreement and stipulation by and between the interested parties, and such further investigation in the above entitled claim having been made as is considered necessray, and no hearing having been applied for by any party in interest, or considered necessary by the Deputy Commissioner, the Deputy Commissioner makes the following:

FINDINGS OF FACT

1. On 11-18-76, the claimant herein, while employed by the employer herein, suffered injury to his lung.

2. The liability of the employer for compensation under the Act was insured by National Loss Control.

3. The claim was controverted by the insurance carrier.

4. The parties have agreed on the pertinent issues and desire to settle the claim on the following basis: A lump sum of $98,000.00 and future medical treatment for any condition that is causally related to the injury of 11-18-76.

5. The Deputy Commissioner, pursuant to the authority vested in her in section 8(i)(A) of the Longshoremen's and Harbor Workers' Compensation Act, as amended, f i n d s
that it is in the best interest of the employee, approves the agreed settlement, and effects a final disposition of claim, discharging the liability of the employer and insurance carrier for such compensation, except for medical treatment.

6. An attorney's fee in the amount of $15,438.00 of which $438.00 is to be used to pay Drs. Simon and Silver is hereby approved in favor of the firm of Ashcraft & Gerel. This fee is payable out of compensation due the claimant.

ORDER

It is ORDERED that the employer and insurance carrier shall pay forthwith all amounts due in accord with the settlement agreement, and file form LS-208 showing timely payment of the settlement amount.

Given under my hand and
filed at Washington, D.C.
this 28th day of August,
1981

/s/ Janice V. Bryant
JANICE V. BRYANT
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS
ADMINISTRATION
Office of Workers' Compesnation
Programs

PLAINTIFF'S
EXHIBIT 7

CERTIFICATE OF FILING AND SERVICE

I certify that on August 28, 1981, the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, 40th Compensation District and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Glenwood Williams
2622 "R" Street, S.E., Washington, DC 20020

Claimant

Lumbermen's Insurance Company
8316 Arlington Blvd, Fairfax, VA 22030

Insurance Carrier or Employer (if self-insured)

A copy was also mailed by regular mail to the following:

Director, Office of Workers' Compensation Programs, (LHWCA), U.S. Department of Labor, Washington, D.C. 20211

William F. Mulroney, Esq.
c/o Ashcraft & Gerel
Suite 700, 2000 L ST., N.W.
Washington, DC 20036

Mr. James M. Barnes, Sr.
Lumbermen's Insurance Co.
8316 Arlington Blvd.
Fairfax, VA 22030

/s/ Janice V. Bryant
JANICE V. BRYANT
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an

amount equal to 20 percent thereof. The additional amount shall be paid at the same time as, but in addition to, such compensation.

The date compensation is due is the date of the Deputy Commissioner filed the decision or order in his office.

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA
Civil Division

GLENWOOD WILLIAMS
1414 Southview Drive
Oxon Hill, MD 20021
Plaintiff

vs.

BECHTEL CIVIL AND MINERALS, INC.
(a Nevada Corporation)

SERVE: THE CORPORATE TRUST
COMPANY OF NEVADA
Suite 1600
1 E First Street
Reno, Nevada

and

BECHTEL ASSOCIATES PROFESSIONAL
CORPORATION
600 Fifth Street, N.W.
Washington, D.C. 20001

SERVE: C.T. CORPORATION
918 - 16th Street, N.W.
Washington, D.C.
Resident Agent
Defendants

Civil Action
No. 81-0856

FILED
APRIL 10 1981
JAMES F. DAVEY,
Clerk

COMPLAINT FOR NEGLIGENCE

COUNT I

1. This Honorable Court has jurisdiction by virtue of Title 28 U.S.C. 1332, there being diversity of citizenship

and the amount sued upon being in excess of Ten Thousand Dollars ($10,000.00).

2. Glenwood Williams, referred to as Plaintiff herein, is a resident of Oxon Hill, Maryland.

3. Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation hereinafter referred to as Defendant "Bechtel" is a foreign corporation incorporated under the laws of the State of Nevada and doing business in the District of Columbia.

4. At all times material herein, Defendant Bechtel was under contract with WMATA to insure job safety at all WMATA construction sites and had the function, duty and responsibility as a safety and engineering consultant to WMATA to oversee safety compliance and to provide *inter alia* overall direction and supervision of safety measures.

5. On or about March 1971, the Plaintiff, Glenwood Williams, commenced to work for S.A. Healy Company at various WMATA construction sites in the District of Columbia while engaged as a laborer and a hard rock miner.

6. During the course of Plaintiff's employment, he necessarily came into close contact with high levels of silica dust and other injurious substances. Plaintiff was exposed to inadequate ventilation and forced to inhale and breathe in the said silica dust and/or other injurious substances, with the result that he became diseased, sick and poisoned, and his internal organs, particularly his lungs and his respiratory system, were affected and weakened so as to cause him to suffer with a disease, all of which was the result of the negligence of the Defendant so that Plaintiff became incapacitated.

7. Defendant Bechtel knew or should have known in the exercise of its professional duties that the atmospheric conditions of the tunnel were dangerous to the Plaintiff and that if the unsafe conditions were allowed to exist in the tunnels, injury to those engaged in the construction process would result.

8. The Plaintiff did make repeated complaints to his employer, to his union representative and to construction supervisors, including employees of Defendant Bechtel, who knew or should have known of the immediate hazard to the Plaintiff's health.

9. Said accident occurred as a direct and proximate result of the Defendant in creating a dangerous condition which it knew, or in the exercise of due and reasonable care should have known existed; in failing to observe the appropriate OSHA standards, the D.C. Safety Standards and other safety regulations in effect.

10. The negligence of the Defendant consisted in the failure of Bechtel to provide the Plaintiff with a safe place to work; in failing to adequately enforce, rectify, implement and direct proper safety standards and regulations, affecting the construction site where Plantiff worked.

11. By reason of the disease contracted through the direct negligence of the Defendant, the Plaintiff suffered and underwent, and in the future will suffer and undergo, severe, painful and permanent injury to his respiratory system and other internal organs of his body.

12. As a further and proximate result of the aforementioned negligence, the Plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage earnings and wage-earning capacity, and has suffered permanent disability.

13. On or about February 11, 1980, the Plaintiff received a medical report from his physician informing him for the first time that he was suffering from a disease known as silicosis.

WHEREFORE, the Plaintiff, Glenwood Williams, demands judgment against the Defendant Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation in the sum of One Million Five Hundred Thousand Dollars, ($1,500,000.00) and cost of this suit.

COUNT II

The Plaintiff, Glenwood Williams, hereby adopts the allegations set forth in Count I above and in addition alleges that:

1. The Defendant Bechtel at the time and place herein relevant negligently, recklessly and without regard for the rights of the Plaintiff, with full knowledge or with knowlledge that should have been obtained, did, because of their gross negligence, caused the Plaintiff harm.

3. As a proximate result of the failure of Bechtel to adequately enforce, rectify, implement and direct safety standards and regulations affecting the construction site where Plaintiff worked, Plaintiff did suffer severe, painful and permanent injury to his respiratory system and other internal areas of his body.

4. As a further and proximate result of the aforementioned negligence, the Plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage earnings and wage-earning capacity, and has suffered permanent disability. Plaintiff suffers from mental depression, anxiety and inability to function as a productive worker in the construction business.

WHEREFORE, the Plaintiff demands punitive damages against Defendant Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation in the full and just amount of One Million Five Hundred Thousand Dollars, ($1,500,000.00).

Respectfully submitted,

ASHCRAFT & GEREL

By /s/ Will. F. Mulroney
William F. Mulroney #234906
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
783-6400
Attorney for Plaintiff

JURY TRIAL REQUESETED

/s/ Will. F. Mulroney
William F. Mulroney

APPENDIX F

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

GLENWOOD WILLIAMS 1414 Southview Drive Oxon Hill, MD 20021 Plaintiff	:	
v.	:	Civil Action No. CA 5414-81
BECHTEL CIVIL AND MINERALS, INC. (a Nevada Corporation)	:	
SERVE: THE CORPORATE TRUST COMPANY OF NEVADA Suite 1600 1 E First Street Reno, Nevada	:	APRIL 9 1981 PAID
and	:	
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION 600 Fifth Street, N.W. Washington, D.C. 20001	:	
SERVE: C.T. CORPORATION 918 - 16th Street, N.W. Washington, D.C. Resident Agent Defendants	:	

MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT ADDING AN ADDITIONAL PARTY DEFENDANT

Comes now the plaintiff GLENWOOD WILLIAMS, by and through counsel, and moves this Honorable Court for

leave to file an Amended Complaint adding the Washington Metropolitan Area Transit Authority as an additional party defendant, and as reasons therefore respectfully refers this Honorable Court to the attached Memorandum Of Points and Authorities in support thereof.

Respectfully submitted,

ASHCRAFT & GEREL:

By /s/ Will . F. Mulroney
William F. Mulroney #234906

/s/ James Hanny #927020

2000 L Street, N.W., Suite 700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion For Leave To File An Amended Complaint was mailed, postage prepaid, this 9th day of April, 1982 to: Gary Brown, Esq., 1625 K Street, N.W., Washington, D.C. 20006; William Schaefer, Esq., 1730 Pennsylvania Avenue N.W., Washington, D.C. 20006; Gordon H. Ball, Inc., 300 Camille Avenue, Danville, California 94526; S.A. Healy Construction Co., 47th & East Avenue, McCook, Illinois; Granite Construction Company, 201 Beach Road, Watsonville, California 95076, and to Morrison-Knudsen Contractors, 400 Broadway, Boise, Idaho 83707, along with the accompanying Memorandum Of Points And Authorities, proposed Order and proposed Amended Complaint.

/s/ Will. F. Mulroney
William F. Mulroney

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

GLENWOOD WILLIAMS 1414 Southview Drive Oxon Hill, MD 20021 Plaintiff	:	
v.	:	Civil Action No. CA 5414-81
BECHTEL CIVIL AND MINERALS, INC. (a Nevada Corporation)	:	
SERVE: THE CORPORATE TRUST COMPANY OF NEVADA Suite 1600 1 E First Street Reno, Nevada	:	
and	:	
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION 600 Fifth Street, N.W. Washington, D.C. 20001	:	
SERVE: C.T. CORPORATION 918 - 16th Street, N.W. Washington, D.C. Resident Agent Defendants	:	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR LEAVE TO FILE AN AMENDED COMPLAINT

1. On February 23, 1982, the defendants herein moved for Summary Judgment on the basis that they are immune from suit under Section 80 of the WMATA compact. The

defendants in effect argue that they are "agents" of WMATA, and thus it is WMATA itself that is legally responsibile for their torts.

2. In light of this new argument, it is respectfully submitted that the Washington Metropolitan Area Transit Authority must now be added as a party defendant. Although plaintiff does not believe the defendants' Motion has merit, the interests of the plaintiff and also those of judicial economy dictate that WMATA should be made an additional party defendant herein. The addition of WMATA will undoubtedly also help to resolve the defendants' motion for WMATA has an interest in the issue now before the Court, that is, whether the defendants herein are as independent contractors in their capacity of construction managers, or whether they are merely agents of WMATA.

3. For the above stated reasons, it is respectfully submitted that the palintiff's Motion for leave to file an Amended Complaint be granted.

Respectfully submitted,

ASHCRAFT & GEREL

By /s/ Will. F. Mulroney
William F. Mulroney #234906

/s/ James M. Hanny
James M. Hanny #927020

2000 L Street N.W.
Suite 700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Plaintiff

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

GLENWOOD WILLIAMS 1414 Southview Drive Oxon Hill, MD 20021 Plaintiff	:	
v.	:	Civil Action No. CA 5414-81
BECHTEL CIVIL AND MINERALS, INC. (a Nevada Corporation) SERVE: THE CORPORATE TRUST COMPANY OF NEVADA Suite 1600 1 E First Street Reno, Nevada and BECHTEL ASSOCIATES PROFESSIONAL CORPORATION 600 Fifth Street, N.W. Washington, D.C. 20001 SERVE: C.T. CORPORATION 918 - 16th Street, N.W. Washington, D.C. Resident Agent Defendants	:	

ORDER

Having reviewed the plaintiff's Motion For Leave To File An Amended Complaint, and the supporting Memorandum of Points and Authorities, it is this ____ day of _____, 1982,

ORDERED, that the plaintiff's Motion is hereby granted, and it is

FURTHER ORDERED, that the plaintiffs Amended Complaint is hereby deemed filed, nunc pro tunc, as of April 9, 1982.

_____

JUDGE

_____

IN THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

GLENWOOD WILLIAMS 1414 Southview Drive Oxon Hill, MD 20021 Plaintiff	:	
v.	:	Civil Action No. 5414-81
BECHTEL CIVIL AND MINERALS, INC. (a Nevada Corporation)	:	CIVIL I – JUDGE DOYLE
SERVE: THE CORPORATE TRUST COMPANY OF NEVADA Suite 1600 1 E First Street Reno, Nevada	:	
and	:	
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION 600 Fifth Street, N.W. Washington, D.C. 20001	:	
SERVE: C.T. CORPORATION 918 - 16th Street, N.W. Washington, D.C. Resident Agent Defendants and Third- Party Plaintiffs	:	
and	:	
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY 600 Fifth Street, N.W. Washington, D.C. 20001	:	

SERVE: JOHN KENNEDY
600 Fifth Street, N.W.
Washington, D.C. 20001
Defendant

v.

GORDON H. BALL, INC.
300 Camille Avenue
Danville, California 94526

and

S.A. HEALY CONSTRUCTION CO.
47th East Avenue
McCook, Illinois

and

GRANITE CONSTRUCTION CO.
201 Beach Road
Watsonville, California 95076

and

MORRISON-KNUDSEN CONTRACTORS
400 Broadway
Boise, Idaho 83707
Third-Party Defendants

COMPLAINT FOR NEGLIGENCE

COUNT I

This Honorable Court has jurisdiction by virtue of Title 11, Section 291 of the District of Columbia Code (1973 Ed.).

2. Glenwood Williams, referred to as Plaintiff herein, is a resident of Oxon Hill, Maryland.

3. Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation hereinafter referred to as Defendant "Bechtel" is a foreign corporation incorporated under the laws of the State of Nevada and doing business in the District of Columbia.

4. At all times material herein, Defendants Bechtel were under contract with defendant Washington Metropolitan Area Transit Authority (hereinafter referred to as WMATA) to insure job safety at all WMATA construction sites and had the function, duty and responsibility as a safety and engineering consultant to WMATA to oversee safety compliance and to provide *inter alia* overall direction and supervision of safety measures.

5. On or about March 1971, the Plaintiff, Glenwood Williams, commenced to work for S.A. Healy Company at various WMATA construction sites in the District of Columbia while engaged as a laborer and a hard rock miner.

6. During the course of Plaintiff's employment, he necessarily came into close contact with high levels of silica dust and other injurious substances. Plaintiff was exposed to inadequate ventilation and forced to inhale and breathe in the said silica dust and/or other injurious substances, with the result that he became diseased, sick and poisoned, and his internal organs, particularly his lungs and his respiratory system, were affected and weakened so as to cause him to suffer with a disease, all of which was the result of the negligence of the Defendant Bechtel so that Plaintiff became incapacitated.

7. Defendants Bechtel knew or should have known in the exercise of its professional duties that the atmospheric conditions of the tunnel were dangerous to the Plaintiff

and that if the unsafe conditions were allowed to exist in the tunnels, injury to those engaged in the construction process would result.

8. The plaintiff did make repeated complaints to his employer, to his union representative and to construction supervisors, including employees of Defendants Bechtel, who knew or should have known of the immediate hazard to the Plaintiff's health.

9. Said accident occurred as a direct and proximate result of the Defendants Bechtel in creating a dangerous condition which it knew, or in the exercise of due and reasonable care should have known existed; in failing to observe the appropriate OSHA standards, the D.C. Safety Standards and other safety regulations in effect.

10. The negligence of the Defendant consisted in the failure of Bechtel to provide the Plaintiff with a safe place to work; in failing to adequately enforce, rectify, implement and direct proper safety standards and regulations, affecting the construction site where Plaintiff worked.

11. By reason of the disease contracted through the direct negligence of the Defendant, the Plaintiff suffered and underwent, and in the future will suffer and undergo, severe, painful and permanent injury to his respiratory system and other internal organs of his body.

12. As a further and proximate result of the aforementioned negligence, the Plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage earnings and wage-earning capacity, and has suffered permanent disability.

13. On or about February 11, 1980, the Plaintiff received a medical report from his physician informing him for the first time that he was suffering from a disease known as silicosis.

WHEREFORE, the Plaintiff, Glenwood Williams, demands judgment against the Defendant Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation in the sum of Five Million Dollars, ($5,000,000.00) and cost of this suit.

COUNT II

The Plaintiff, Glenwood Williams, hereby adopts the allegations set forth in Count I above and in addition alleges that:

2. The Defendants Bechtel at the time and place herein relevant, recklessly, willfully, wantonly, and without regard for the rights of the Plaintiff, with full knowledge or with knowledge that should have been obtained, did, because of their misconduct, cause the Plaintiff harm.

3. As a proximate result of the failure of Defendants Bechtel to adequately enforce, rectify, implement and direct safety standards and regulations affecting the construction site where Plaintiff worked, Plaintiff did suffer severe, painful and permanent injury to his respiratory system and other internal areas of his body.

4. As a further and proximate result of the aforementioned negligence, the Plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage erarnings and wage-earning capacity, and has suffered permanent disability. Plaintiff suffers from mental depression, anxiety and inability to function as a productive worker in the construction business.

WHEREFORE, the Plaintiff demands punitive damages against Defendant Bechtel Civil and Minerals,

Inc. and Bechtel Associates Professional Corporation in the full and just amount of Thirty Million Dollars, ($30,000,000.00).

COUNT III

The allegations contained in Counts I and II are incorporated by reference herein.

2. The defendant Washington Metropolitan Area Transit Authority (hereinafter "WMATA") is a common carrier doing business and headquartered in the District of Columbia.

3. Defendant Washington Metropolitan Area Transit Authority knew, or should have known, that atmospheric conditions on the Metro construction sites where the plaintiff worked were dangerous to the plaintiff and that if the unsafe conditions were allowed to continue to exist, injury to those engaged in the underground construction process would result. Despite this knowledge, defendant WMATA failed to initiate or to direct corrective measures.

4. The plaintiff's lung disease occurred as a direct and proximate result of the defendant in creating a dangerous condition which it knew, or in the exercise of due and reasonable care should have known existed; in failing to direct or require observance of the appropriate OSHA standards, the D.C. Safety standards and safety regulations and standards then and there in effect.

5. As a proximate result of the defendant WMATA's negligence, the plaintiff has contracted a permanent and severe lung impairment to his respiratory system.

6. As a further proximate result of the defendant WMATA's negligence, plaintiff has incurred and will con-

tinue to incur substantial medical expenses, substantial wage earnings and has suffered permanent disability.

WHEREFORE, the Plaintiff demands judgement against the Defendant Washington Metropolitan Area Transit Authority in the sum of Five Million Dollars ($5,000,000.00).

COUNT IV

Plaintiff hereby incorporates by reference the allegations of Counts I, II and II.

2. Plaintiff hereby alleges in the alternative that if defendants Bechtel are adjudicated to be "agents" of defendant WMATA then the negligence of defendants Bechtel is imputed to defendant WMATA under principles of agency, and/or vicarious liability and/or imputed negligence.

WHEREFORE, for said imputed liability the plaintiff demands judgement in the full and just amount of Five Million Dollars ($5,000,000.00).

COUNT V

The plaintiff hereby incorporates by reference the allegations contained in Counts I through IV.

2. Plaintiff further alleges that the construction work which he performed from 1971 - 1972 was by its nature inherently dangerous work, and that defendant WMATA's duty to provide a safe work place was non-delegable. Thus it is further alleged that defendant WMATA is liable for the failure to provide for a safe working environment for the negligence of the third party defendants and defendants Bechtel under principles of imputed negligence.

WHEREFORE, the plaintiff demands judgement against defendant WMATA in the amount of Five Million Dollars ($5,000,000.00).

COUNT VI

Plaintiff hereby incorporates by reference the allegations contained in Counts I through V.

2. Plaintiff hereby alleges that the misconduct of defendant WMATA in failing to direct or initiate action which would have protected the plaintiff from respiratory harm was done with full knowledge of the probable harm being done to the plaintiff, and constituted willful, wanton, and reckless misconduct.

WHEREFORE, the plaintiff demands judgement for punitive damages against defendant WMATA in the amount of Thirty Million Dollars ($30,000,000.00).

Respectfully submitted,

ASHCRAFT & GEREL

By: _____
William F. Mulroney #234906

_____
James M. Hanny #927020

_____
Michelle A. Parfitt #358592
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
783-6400
Attorneys for Plaintiff

FILED
APR 9 1982
Superior Court
of the District of Columbia
Washington, D.C.

JURY TRIAL REQUESTED

/s/ William F. Mulroney
William F. Mulroney

APPENDIX G

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Division

GLENWOOD WILLIAMS 1414 Southview Drive Oxon Hill, MD 20021 Plaintiff	)	
v.	)	Civil Action No.: 82-0999
WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY 600 - 5th Street, N.W. Wash., D.C. 20001 Defendant	)	FLANNERY, J. APR 9 1982
SERVE: John Kennedy 600 - 5th Street, N.W. Washington, D.C. 20001	)	

COMPLAITN FOR NEGLIGENCE

COUNT I

This Honorable Court has jurisdiction by virtue of Title I, Section 1-2439 of the District of Columbia Code (1981 Ed.).

1. Glenwood Williams, the plaintiff herein, presently resides at 1414 Southview Drive, Oxon Hill, Maryland 20021.

2. Beginning in 1971, the defendant Washington Metropolitan Area Transit Authority (hereinafter referred to as Metro) entered into yearly construction management contracts with Bechtel Civil and Minerals, Inc. and Bechtel Associates Professional Corporation in order to supervise

the construction and job safety of Metro construction sites relative to the ongoing subway construction.

3. At all times material herein, the Bechtel Corporation referred to in the preceding paragraph were to insure job safety at all Metro construction sites and had the function, duty and responsibility as a safety and engineering consultant to Metro to oversee safety compliance and to provide *inter alia* overall direction and supervision of safety measures.

4. The Bechtel Corporation acted as agents, employees and/or servants of Metro in performing their contractual duties.

5. In or about March 1971, the plaintiff, Glenwood Williams, commenced to work for S.A. Healy Company at various Metro Construction sites in the District of Columbia while engaged as a laborer and a hard rock miner.

6. During the course of plaintiff's employment, he necessarily came into close contact with high levels of silica dust and other injurious substances. Plaintiff was exposed to inadequate ventilation and forced to inhale and breathe in the said silica dust and/or other injurious substances, with the result that he became diseased, sick and poisoned, and his internal organs, particularly his lungs and his respiratory system, were affected and weakened so as to cause him to suffer with a disease, all of which was the result of the negligence of the defendant's employees, agents, and/or servants so that plaintiff became incapacitated.

7. The defendant knew or should have known directly and/or through the Bechtel Corporation that the atmospheric conditions of the tunnel were dangerous to the plaintiff and that if the unsafe conditions were allowed to

exist in the tunnels, injury to those engaged in the construction process would result. Despite this knowledge, defendant failed to initiate or direct corrective measures either directly or through its agents, employees and/or servants.

8. The plaintiff's lung disease occurred as a direct and proximate result of the defendant in creating a dangerous condition which it knew, or in the exercise of due and resonable care should have known existed; in failing to observe the appropriate OSHA standards, the D.C. Safety Standards and other safety regulations in effect.

9. The negligence of the defendant consisted in its failure both directly and through its agents, employees and/or servants to provide the plaintiff with a safe place to work; in failing to adequately enforce, rectify, implement and direct proper safety standards and regulations, affecting the construction site where plaintiff worked.

10. By reason of the disease contracted through the negligence of the defendant, the plaintiff suffered and underwent, and in the future will suffer and undergo, severe, painful and permanent injury to his respiratory system and other internal organs of his body.

11. As a further and proximate result of the aforementioned negligence, the plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage earnings and wage-earning capacity, and has suffered permanent disability.

12. On or about February 11, 1980, the plaintiff received a medical report from his physician informing him for the first time that he was suffering from a disease known as silicosis.

WHEREFORE, the plaintiff, Glenwood Williams, demands judgment against the defendant Washington Metropolitan Area Transit Authority in the sum of Five Million Dollars, ($5,000,000.00) and cost of this suit.

COUNT II

The plaintiff, Glenwood Williams, hereby adopts the allegations set forth in Count I above and in addition alleges that:

1. The defendant Metro at the time and place herein relevant recklessly, willfully, wantonly and without regard for the rights of the plaintiff, with full knowledge of the probable consequences, caused the plaintiff's lung disease.

2. As a proximate result of the failure of defendant to adequately enforce, rectify, implement and direct safety standards and regulations affecting the construction site where plaintiff worked, plaintiff did suffer severe, painful and permanent injury to his respiratory system and other internal areas of his body.

3. As a further and proximate result of the aforementioned misconduct, the plaintiff has incurred, and will continue to incur, substantial medical expenses in the future, has lost substantial wage earnings and wage-earning capacity, and has suffered permanent disability. Plaintiff suffers from mental depression, anxiety and inability to function as a productive worker in the construction business.

WHEREFORE, the plaintiff, Glenwood Williams, demands punitive damages against defendant Washington Metropolitan Area Transit Authority in the full and just amount of Ten Million Dollars ($10,000,000.00).

Respectfully submitted,

ASHCRAFT & GEREL

BY: /s/ Will. F. Mulroney
William F. Mulroney #234906

BY: /s/ James M. Hanny
James M. Hanny #927020

BY: /s/ Michelle A. Parfitt
Michelle L. Parfitt #358592
2000 L Street, N.W., Suite #700
Washington, D.C. 20036
(202) 783-6400
Attorneys for Plaintiff

JURY TRIAL REQUESTED

/s/ Will. F. Mulroney
William F. Mulroney

APPENDIX H

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

DANIEL H. SCOTT	)	C.A. No. 82-1332
KLOMAN KNIGHT	)	C.A. No. 82-1408
GEORGE KOHL	)	C.A. No. 82-1409
FREDDIE WILLIAMSON	)	C.A. No. 82-1410
JOHN J. JACKSON	)	C.A. No. 82-1411
WILLIAM MAHAFFEY	)	C.A. No. 82-1412
GLENWOOD WILLIAMS	)	C.A. No. 82-1413
RICHARD ADAMS	)	C.A. No. 1414
WILLIAM MAHAFFEY	)	C.A. No. 82-1415
WILLIAM A. KNIGHT	)	C.A. 82-1416
KENNETH KIMBLE	)	C.A. No. 82-1696
JAMES S. MCNEAL	)	C.A. No. 83-44
Appellants	)	
v.	)	
BECHTEL ASSOCIATES PROFESSIONAL CORPORATION, D.C. et al.	)	
Defendants	)	

MOTION FOR SUMMARY REVERSAL OF THE CONSOLIDATED APPEALS

Comes now the appellants, by and through counsel, for purposes of moving this Honorable Court for summary reversal of the consolidated appeals for purposes of granting leave in the Court below to amend the complaints herein to add the Washington Metropolitan Area Transit Authority as a party defendant, and as reasons therefore appellants respectfully state the following:

1. The consolidated actions herein were brought for occupational and accidental injuries suffered by workers engaged in the construction of the Washington Metropolitan Area Transit Authority's subway system. The cases were brought in reliance on *Caldwell v. Bechtel, Inc.*, 631 F.2d 989 (1980), which held the defendant Bechtel herein owed these subway construction workers a duty of care to insure compliance with all applicable safety codes by virtue of its contract with the Washington Metropolitan Area Transit Authority to oversee safety compliance by the construction companies engaged in the actual construction work. Id. at 1001-1003.

2. Beginning in February, 1982, some ten months after the initiation of the instant litigation[1] defendant Bechtel began moving for Summary Judgment in these and related cases both in Superior Court and in the United States District Court based on Section 80 of the WMATA Com-

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[1]The first Motion for Summary Judgment by defendant Bechtel based on Section 80 immunity was made in the case of *Calvin Walker v. Bechtel Associates Professional Corporation, D.C., et al.*, (hereinafter called Bechtel) on February 10, 1982 before Judge Richey in U.S. District Court, 12 days before the scheduled February 22, 1982 trial date.

pact. With regard to the actions in U.S. District Court, the plaintiffs therein moved to amend their complaints to include WMATA as an additional party defendant. Those motions were routinely granted by all of the judges at the U.S. District Court.[2]

3. However, with regard to the Superior Court actions, the motions to amend to include WMATA as a party defendant were denied by the trial court[3] because of the mistaken assumption that Superior Court did not possess subject matter jurisdiction over cases involving WMATA as a party defendant pursuant to Section 81 of the WMATA Compact.[4]

4. The trial court's reasoning was unsound and the precedent for it has been overruled by this Court's en banc decision in *Qasim, et al. v. WMATA, et al.*, 455 A.2d 904 (D.C. App. 1983), which held that Superior Court has concurrent jurisdiction over WMATA with United States District Court for the District of Columbia. Therefore, considering the liberal amendment policy outlined in Rule

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[2]Among others, the motions were granted in the cases of *Johnson v. Bechtel* (Judge Corcoran); *Eighmey v. Bechtel* (Judge June Greene); *Walker v. Bechtel* (Judge Richey); *Clanagan v. Bechtel* (Judge Richey); *Wilmes v. Bechtel* (Judge Flannery); and *Ludolph v. Bechtel* (Judge Joyce Greene).

[3]Judge Doyle denied the motions to amend in the Civil I cases *Glenwood Williams v. Bechtel*, C.A. 5414-81; *Freddy Williamson et ux. v. Bechtel*, C.A. 7689-81; and *John Jackson v. Bechtel*, C.A. 5004-81 on September 23, 1982. (See Exhibits #1-3 attached hereto). An oral motion to amend was denied for the same reason in the case of *William Knight v. Bechtel*, September 23, 1982.

[4]Subsequent lower court decisions in the consolidated appeals refused to stay proceedings pending appellate decisions in the *Qasim v. WMATA* and *Johnson v. Bechtel* should also be reversed to permit amendment.

15(a) of the Superior Court Rules, the trial court abused its discretion in refusing to permit the amendment of the complaints herein as had the U.S. District Court.

5. The recent decision of the United States Court of Appeals for the District of Columbia Circuit in the consolidated case of *Johnson v. Bechtel Associates Professional Corporation, D.C., et al.* (Appeal No. 82-2017, Decided August 19, 1983) has now resolved the issue of Bechtel's immunity and WMATA's responsibility in tort. (Exhibit #4 attached hereto). The Court noted at page 6 that "[b]ecause of the contractual relationship between the parties, WMATA or Bechtel appeared to be a proper third-party defendant." However the Court went on to hold that "WMATA, the principal, has a duty to protect workers from physical harm caused by the construction of WMATA." [at p. 9, footnote 6]. Defendant Bechtel was an agent of WMATA engaged in the performance of that duty, and was thus immune from suit under Section 80 of the Compact [Decision at page 9].

6. With the issue of Bechtel's Section 80 immunity resolved, it is submitted that equity and the interests of justice mandate summary reversal of these appeals to permit amendment of the complaints prior to dismissal of the complaints against Bechtel. The statute of limitations has run in all of these appeals unless amendment of the original complaints is permitted. As shown above, the sole reason given by the trial courts below for refusing to permit leave to amend was based on the erroneous assumption that subject matter jurisdiction was lacking. Thus the trial court abused it discretion in refusing to permit the amendment as a matter of law.[5]

[5]The Court will note that appellant Glenwood Williams herein filed a duplicative action in U.S. District Court following Bechtel's filing of its first motions based on Section 80 immunity. That action was

7. Finally, the motion herein is clearly inapplicable to *Knight v. Bechtel; Kohl v. Bechtel* and *McNeal v. Bechtel,* which were dismissed not on the basis of §80 immunity but rather on the application of §33(b) of the Longshoremen's and Harbor Workers' Act, as made applicable to the District of Columbia, and the applicability of *Rodriguez v. Compass Shipping Co.,* 451 U.S. 596 (1981).

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dismissed based on the application of *Rodriguez v. Compass Shipping Co.*, 451 U.S. 596 (1981). (See *Johnson* decision at pp. 24-28.) The sole reason for the filing of that duplicative action was appellant Williams' fear that the trial court would deny its motion to amend the complaint to include WMATA as a party defendant. *Qasim* has not yet been decided and several lower court judges had ruled that the Superior Court lacked subject matter jurisdiction. However, appellant Williams' Superior Court action is clearly not barred by *Rodriguez.* The amendment to include WMATA, once granted, will relate back to the date of the filing of the action under Rule 15(c).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the consolidated cases with the exception of those noted in paragraph 7 be remanded to the trial court to permit amendment of the original complaint to include the Washington Metropolitan Area Transit Authority as a party defendant.

Respectfully submitted,

ASHCRAFT & GEREL

/s/ William F. Mulroney
William F. Mulroney

/s/ James M. Hanny
James M. Hanny

/s/ Michelle A. Parfitt
Michelle A. Parfitt
2000 L Street, N.W., Suite 700
Washington, D.C. 20036
783-6400
Attorneys for Appellants

DISTRICT OF COLUMBIA
COURT OF APPEALS
FILED SEP 9 1983
xxx
Clerk

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing Motion for Summary Reversal of the Consolidated Cases was mailed, postage prepaid, this 9th day of September, 1983 to: Gary W. Brown, 1625 K Street, N.W., Washington, D.C. 20006; William Schaefer, 1722 Eye Street, N.W., Washington, D.C. 20006; Edward Gorman, 4701 Sangamore Road, Bethesda, Maryland 20816.

/s/ William F. Mulroney
William F. Mulroney

Office - Supreme Court, U.S.
FILED
DEC 6 1983
ALEXANDER L. STEVAS,
CLERK

No. 83-822

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

GLENWOOD WILLIAMS,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

E. BARRETT PRETTYMAN, JR.*
VINCENT H. COHEN
ROBERT B. CAVE
PAUL J. LARKIN, JR.
HOGAN & HARTSON
(a partnership including
professional corporations)
815 Connecticut Avenue, N.W.
Washington, D.C. 20006
(202) 331-4685
Counsel for Petitioner

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether an employee may bring a third-party suit under Section 33(b) of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. § 933(b)) past the six-month time period specified by that Section, simply because that employee filed a different suit against a different third party within that six-month time period.

2. Whether Congress intended to permit an employee to bring suit past the Section 933(b) six-month period because of an alleged conflict of interest, despite the absence of any language in the statute so providing, where the only evidence of such a conflict is the fact that the employer and a third-party tortfeasor have a common insurance carrier.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-822

GLENWOOD WILLIAMS,
Petitioner,

v.

WASHINGTON METROPOLITAN AREA
TRANSIT AUTHORITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The decision of the United States District Court for the District of Columbia granting the Washington Metropolitan Area Transit Authority's motion for summary judgment (Pet. App. A, 1a-2a) is not officially reported. The decision of the United States Court of Appeals for the District of Columbia Circuit, from which certiorari is sought (Pet. App. B, 3a-30a), is reported at 717 F.2d 574 (1983).

JURISDICTION

The decision of the Court of Appeals was rendered on August 19, 1983 (Pet. App. 7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT

Petitioner is a construction worker employed by Ball-Healy-Granite, a contractor engaged by the Washington Metropolitan Area Transit Authority ("WMATA") for the construction of the Metro subway system. Alleging that he had suffered injuries arising out of his employment, Petitioner filed suit in the Superior Court of the District of Columbia against Bechtel Associates Professional Corp., D.C., and Bechtel Civil and Minerals, Inc. ("Bechtel"), WMATA's agent, seeking damages from Bechtel for its alleged failure to provide him with a safe workplace (Pet. App. 37a-41a). At the same time, Petitioner filed a claim for workers' compensation benefits under the Longshoremen's and Harbor Workers' Compensation Act ("LHWCA"), 33 U.S.C. § 901 *et seq.*[1] On August 28, 1981, Petitioner received a lump sum compensation award of $98,000, as well as an award for future, related medical expenses and attorneys fees (*id.* 33a-36a).

More than six months later, on April 9, 1982, Petitioner moved to amend his complaint in Superior Court to add WMATA as an additional third-party defendant (*id.* at 42a-43a), and also filed an original suit against WMATA in United States District Court for the District of Columbia (*id.* at 57a-61a). WMATA thereafter moved in federal court for summary judgment, chiefly on the grounds that (1) Petitioner's claim was barred as untimely under the six-month time period for bringing a third-party suit prescribed by LHWCA Section 933(b),

[1] While the LHWCA is no longer directly applicable to the District of Columbia, it was applicable to the District of Columbia under D.C. Code §§ 36-501 *et seq.* at all times relevant here (*see* Pet. App. 16a & n.12).

and (2) WMATA was immune from suit under LHWCA Sections 904 and 905(a). The District Court granted WMATA's motion, ruling that WMATA was immune from suit under Sections 904 and 905(a) for the reasons given in two earlier District of Columbia District Court decisions on this question (Pet. App. 1a).[2] The District Court therefore did not reach the Section 933(b) issue.

The Court of Appeals affirmed. The court first concluded that WMATA was not immune from suit under Section 904 and 905(a) (*see* Pet. App. 16a-23a).[3] Nonetheless, the Court of Appeals affirmed the District Court's judgment on the ground that Petitioner's suit was barred by Section 933(b) (*see id.* at 26a-30a). Relying upon *Rodriguez* v. *Compass Shipping Co.*, 451 U.S. 596 (1981), the court ruled that Congress had overruled this Court's decision in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), in the 1959 amendments to LHWCA Section 933.[4] The Court of Appeals acknowledged (Pet. App. 28a) that *Rodriguez* had left open the question whether the 1959 amendments overruled the specific conflict-of-interest exception adopted in *Czaplicki*, but concluded that the language, structure, legislative history, and underying policies of those amendments, as discussed in *Rodriguez*, all demanded the conclusion that the *Czaplicki* exception had not survived the 1959 LHWCA amendments (*id.* 27a-29a).

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[2] The two earlier decisions cited in the District Court's decision below are reproduced in the Appendix to the Petition in *WMATA* v. *Johnson*, No. 83-747, *petition for cert. pending* (filed Nov. 4, 1983), at 1a-4a, 6a-12a.

[3] WMATA has sought review of this portion of the ruling below in its Petition in No. 83-747.

[4] In *Czaplicki*, the Court permitted an injured longshoreman to bring a third-party suit after accepting a compensation award, despite the apparent bar created by Section 933, where the stevedore had failed to bring suit because of a conflict of interest arising from a common insurance carrier for both the stevedore and the third-party defendant.

ARGUMENT

Further review of the decision below is unwarranted. That decision is fully consistent with the language and legislative history of LHWCA Section 933(b), as well as with this Court's decision in *Rodriguez* v. *Compass Shipping Co., supra.* Moreover, the ruling below is also fully consistent with the only other appellate court decisions on the issues presented in the Petition. *Edwards* v. *Bechtel Associates Professional Corp.*, 466 A.2d 436 (D.C. App.), *cert. denied*, No. 83-560 (Nov. 28, 1983); *Westbrook v. Hutchinson Crane Excavating Co., Inc.*, No. 82-1151 (D.C. App. June 30, 1983), *cert. denied*, No. 83-540 (Nov. 28, 1983). Finally, the judgment below is correct for a different reason than the one upon which the Court of Appeals relied: namely, WMATA is entitled to the immunity afforded the sole compensation provider by LHWCA Sections 904 and 905(a).

1. Petitioner's principal contention is that by filing suit against Bechtel, WMATA's agent, within the six-month period fixed by Section 933(b), he thereby tolled the running of that time period for any other third-party suits he might thereafter care to bring (Pet. 11-14). That contention is flawed in several respects.

To begin with, it is inconsistent with the plain language of Section 933(b). That Section provides that acceptance of a compensation award under an order constitutes an assignment of the employee's tort claim "against *such third person* unless" the employee "shall commence an action *against such third person* within six months after such award" (Pet. 4; emphasis added). Congress plainly intended to require an employee to bring his third-party claim against each alleged third-party defendant within the Section 933(b) six-month period to avoid an assignment of his claim with respect to each third-party defendant. Nothing in the language of Section 933(b) suggests that an employee can toll the run-

ning of that six-month period against the world simply by filing one particular suit against one specific defendant. Moreover, the legislative history and purposes of the 1959 amendments demonstrate that Congress intended the six-month period to be exclusive, and do not hint that an employee can toll the Section 933(b) period in the manner suggested by Petitioner. *See* S. Rep. No. 428, 86th Cong., 1st Sess. 2 (1959); H.R. Rep. No. 229, 86th Cong., 1st Sess. 4 (1959); *Rodriguez*, 451 U.S. at 604-612. *See also Bloomer* v. *Liberty Mutual Ins. Co.*, 445 U.S. 74, 79-80 (1980).

Petitioner's construction of Section 933(b) also does not further the purposes of the LHWCA. The Court recognized in *Rodriguez* that "one of the purposes of the Act is to minimize the need for litigation as a means of providing compensation for injured workmen" (451 U.S. at 616), and that, in the Act, "Congress necessarily balanced the conflicting interests of the vessel owner [*i.e.*, third-party], the stevedore [*i.e.*, the employer], and the longshoreman." *Id.* at 617. Petitioner's construction would permit an employee, by the simple device of suing *someone*, perhaps even someone from whom the employee knows he cannot collect, to reserve his right to sue *everyone*, including those parties who have legitimately relied upon the Section 933(b) limitation in ordering their affairs. By encouraging spurious litigation as well as delay, Petitioner's construction would undermine the policy of repose manifested by the Section 933(b) six-month period and disrupt the balance of interests Congress accomplished through that Section.[5]

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[5] Petitioner's contention (Pet. 13) that Section 933(b) is unconcerned with the interests of third-parties such as WMATA is also in error. *See, e.g., Rodriguez*, 451 U.S. at 617; *Del Re* v. *Prudential Lines, Inc.*, 669 F.2d 93, 97 (2d Cir. 1982) ("we disagree that the Act was amended [in 1959] solely for the protection and benefit of the longshoreman [here, the employee] and his employer and not for that of the third-party shipowner. Congress devised a statutory scheme intended to balance the interests of all three").

Petitioner's argument that the decision below "split[s] [his] right of action" in a manner forbidden by *Rodriguez* (Pet. 11) is plainly in error. Petitioner's quotation (*id.* at 12) from *Rodriguez* is taken out of context. Nothing in *Rodriguez* suggests that an employee may toll the Section 933(b) time period simply by bringing suit against a different party. *Rodriguez* recognized only that an employee has the right to bring a third-party suit within the six-month Section 933(b) period, and that his right is irretrievably assigned to his employer after that period has passed if he has not already brought suit. 451 U.S. at 603. The court below correctly applied that decision by ruling that Petitioner's suit, filed more than six months after receiving a compensation award (Pet. App. 26a; page 2, *supra*), was untimely. Petitioner's argument (Pet. 14) that the decision below "in effect vests rights in Respondent WMATA which it clearly does not have" is similarly wide of the mark. Section 933(b) is analogous to a six-month statute of limitations within which an injured employee must file a third-party suit, and the only "righ[t]" WMATA thus obtains is the right thereafter to be free from suit by that employee that any statute of limitations provides any potential defendant.

Furthermore, Petitioner has wholly failed to demonstrate that this question is a matter of sufficient national concern to warrant this Court's attention. Certainly, few, if any, other cases will arise in the posture presented here, involving different suits against different third-parties in different courts. Because the unique posture of this case makes this question unlikely to recur, further review is unwarranted.

2. Petitioner's second argument (Pet. 14-19) is that WMATA's wrap-up workers' compensation insurance program,[6] by employing a common insurance carrier for all contractors and subcontractors, discourages employers from bringing assigned third-party suits, and therefore

[6] WMATA's insurance program is described in greater detail in the Petition in No. 88-747, at 5, 20-25.

creates a conflict of interest Congress could not have anticipated when drafting the 1959 amendments. Further review of that question is unnecessary for two reasons.

First, the premise of Petitioner's argument (*see* Pet. 14-16) is that the *Czaplicki* conflict-of-interest exception survived the 1959 LHWCA amendments to former Section 933. For the reasons given by the District of Columbia Circuit (Pet. App. 26a-30a), however, upon which we rely, Congress eliminated that exception in those amendments.[7] The District of Columbia Court of Appeals has also come to the same conclusion. *Edwards* v. *Bechtel Associates Professional Corp.*, 466 A.2d 436, 438-439 (D.C. App.), *cert. denied*, No. 83-560 (Nov. 28, 1983); *Westbrook* v. *Hutchinson Crane Excavating Co.*, No. 82-1151 (D.C. App. June 30, 1983) (*mem.*), slip op. at 2-3, *cert. denied*, No. 83-540 (Nov. 28, 1983).[8] Petitioner's conclusion therefore falls with his premise.

Second, while this Court reserved decision in *Rodriguez* as to whether proof of a conflict of interest that Congress could not have foreseen in 1959 might justify an exception to Section 933(b) (*see* 451 U.S. at 618), this case does not present that issue. The only circumstance here

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[7] The District of Columbia Circuit had reached the same conclusion in an earlier, unpublished decision in *Phillipi* v. *Bechtel Assoc. Prof. Corp.*, 702 F.2d 1206 (D.C. Cir. 1983) (*mem.*), and on October 3, 1983, this Court denied a Petition seeking review of the same issue presented in question 2 of this Petition. *Phillipi* v. *Bechtel Assoc. Prof. Corp.*, No. 82-2084.

[8] Petitioner's reliance (Pet. 15) upon *Bandy* v. *Bank Line Ltd.*, 518 F. Supp. 1229 (E.D. Va. 1981), is misplaced. The court there ruled that there was no evidence of a *Czaplicki* conflict under Section 933(b). 518 F. Supp. at 1233. The court therefore did not consider the question presented by this Petition. The District Court in *Susino* v. *Hellenic Lines Ltd.*, 551 F. Supp. 1080 (E.D.N.Y. 1982), did rule that *Czaplicki* had survived the 1959 LHWCA amendments (551 F. Supp. at 1083), but the Second Circuit has yet to rule on that question, and there is no reason to presume that the Second Circuit will follow the District Court's ruling in *Susino*. Review of this question should await further consideration by the lower federal courts.

allegedly giving rise to a conflict is the fact that Petitioner's employer, Ball-Healy-Granite, and WMATA have a common insurance carrier (Pet. 16-17). However, that was also the precise situation in *Czaplicki* (351 U.S. at 526-527, 529-532), and Congress was well aware of this situation when it amended Section 933. *See Rodriguez*, 451 U.S. at 610-612 & n.25. Further review of this question is therefore unwarranted, particularly since it likewise has not been shown to be a matter of national concern.

3. Finally, further review is also unnecessary because WMATA is entitled to the immunity from employment-related suits provided by Sections 904 and 905(a). While the Court of Appeals rejected this argument (Pet. App. 16a-23a), contrary to the decision of the District Court (*id.* at 1a-2a), for the reasons given in our Petition in *Washington Metropolitan Area Transit Authority* v. *Johnson*, No. 83-747, *pending*, we believe that this ruling was in error, and have sought summary reversal of the Court of Appeals' decision with respect to this issue. Therefore, should the Court grant our Petition and summarily reverse that ruling, WMATA would be immune from Petitioner's claims, and the Petition in this case should be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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